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GOODEVE'S MODERN LAW

OF

REAL PROPERTY.

THE

MODERN LAW

OF

REAL PROPERTY

WITH AN APPENDIX CONTAINING

THE VENDOR AND PURCHASER ACT, 1874;
THE CONVEYANCING ACTS, 1881 TO 1892;
THE SETTLED LAND ACTS, 1882 TO 1890;
THE MARRIED WOMEN'S PROPERTY ACTS, 1882 AND 1893;
AND
THE TRUSTEE ACT, 1893, ss. 10—12.

BY THE LATE

L. A. GOODEVE,

OF THE MIDDLE TEMPLE.

FOURTH EDITION.

BY

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PREFACE

TO THE FOURTH EDITION.

THIS Edition has been carefully revised, and the Editors hope that it will be found of use to junior practitioners as well as to students, for whom it is especially designed.

With this view, historical matter has been deemed out of place, and the modern law preferred, except where the latter is not intelligible without some reference to the former.

The Editors have introduced numerous references to Littleton, Coke, and other early authorities, and have made much use of Cruise's "Digest of the Law of Real Property," of the valuable "History of the Law of Real Property," by Mr. Kenelm Digby, and of the learning of Mr. Challis's well-known work.

The Text and Notes have in all cases been brought up to date, and numerous transpositions have been made which, in the opinion of the Editors, render the sequence of the Text more logical.

It is hoped that the utility of the Appendix has been increased by references inserted throughout to those passages of the Text bearing on the various sections of the statutes contained in it, and to any alterations or amendments made by any later statutes.

An entirely new Index, in alphabetical order, to the Text, Notes, and Appendix has been added.

The Editors venture to hope that the present Edition of the Author's book preserves the merits which gained for it a place among the works recommended by the University of Oxford and the Council of Legal Education.

H. W. E.
J. W. C.
A. D.

August 1*st*, 1897.

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LIST OF ABBREVIATIONS.

A. C., preceded by date of year	Appeal Cases (Law Reports since 1890).
A. & E. / Ad. & El.	Adolphus & Ellis's Reports.
Ab. Eq.	Cases in Equity Abridged.
Amb.	Ambler's Reports.
Anders.	Anderson's Reports.
App. Cas.	Appeal Cases (in the Law Reports, 1875 to 1890).
Atk.	Atkyns's Reports.
B. & A. / B. & Al. / B. & Ald.	Barnewall & Alderson's Reports.
B. & Ad.	Barnewall & Adolphus's Reports.
B. & C.	Barnewall & Cresswell's Reports.
B. & S.	Best & Smith's Reports.
Bac. Abr.	Bacon's Abridgment.
Beav.	Beavan's Reports.
Bing.	Bingham's Reports.
Bl.	Blackstone's Commentaries.
Bli. N. S.	Bligh's Reports, New Series.
Bos. & P.	Bosanquet & Puller's Reports.
Bro. Ab.	Brooke's Abridgment.
Bro. C. C.	Brown's Chancery Cases.
Brod. & B.	Broderip & Bingham's Reports.
Broom's Comm.	Broom's Commentaries (9th Ed.).
Bulst.	Bulstrode's Reports.
Burge, Comm.	Burge's Commentaries on Colonial and Foreign Laws.
Burr.	Burrows' Reports.
Burton, Comp.	Burton's Compendium of the Law of Real Property.
Byth. & Jarm.	3rd Ed., by Sweet.
Byth. & Jarm., Rob.	4th Ed., by Robbins.
C. B.	Common Bench Reports.
C. B. N. S.	,, ,, ,, New Series.
C. M. & R.	Crompton, Meeson & Roscoe's Reports.
Camp.	Campbell's Reports.
Ch. Div.	Chancery Division (Law Reports from 1875 to 1890).
Ch., preceded by date of year	Chancery Division (Law Reports since 1890).
Challis, R. P.	Challis on Real Property (2nd Ed.).

Chitty, Prerog. . .	Chitty on the Prerogative of the Crown.
Cl. & F. . . .	Clark & Finelly's Reports.
Co. Cop. . . .	Coke's Complete Copyholder.
Co. Litt. . . .	Coke upon Littleton (sometimes cited as First Institute). The references to the notes are to those by Hargrave and Butler.
Coll. . . .	Collyer's Reports.
Com. Dig. . . .	Comyn's Digest.
Com. Rep. . . .	Comyn's Reports.
Conv. & Law of Prop. Act	Conveyancing and Law of Property Act.
Cowp. . . .	Cowper's Reports.
Cr. & J. . . .	Crompton & Jervis's Reports.
Cr. & Ph. . . .	Craig & Phillips' Reports.
Cro. El. / Cro. Jac. / Cro. Car.	Croke's Reports in the time of Elizabeth, James I. and Charles I.
Cruise, Dig. . . .	Cruise's Digest of the Law of Real Property.
Dar. & Bos. . . .	Darby & Bosanquet's Statutes of Limitations (2nd Ed.).
Dart, V. & P. . . .	Dart's Law of Vendors and Purchasers (6th Ed.).
Dav. Conc. Prec. . .	Davidson's Concise Precedents (16th Ed.).
Dav. Prec. . . .	Davidson's Conveyancing Precedents.
Dea. & Ch. . . .	Deacon & Chitty's Reports.
De G. F. & J. . .	De Gex, Fisher & Jones's Reports.
De G. J. & S. . .	De Gex, Jones & Smith's Reports.
De G. M. & G. / D. M. & G.	De Gex, Macnaghten & Gordon's Reports.
De G. & S. . . .	De Gex & Smale's Reports.
Dicey	Dicey's Conflict of Laws (1896).
Dick.	Dickens's Reports.
Digby, R. P. . . .	Digby's History of the Law of Real Property (4th Ed.).
Dougl. / Doug.	Douglas's Reports.
Dow & Cl. . . .	Dow & Clark's Cases.
Drew.	Drewry's Reports.
Dr. & Sm. . . .	Drewry & Smale's Reports.
Dr. & War. . . .	Drury & Warren's Reports.
Dy. / Dyer	Dyer's Reports.
E. & B. / El. & Bl.	Ellis & Blackburn's Reports.
E. B. & E. . . .	Ellis, Blackburn & Ellis's Reports.
E. & E.	Ellis & Ellis's Reports.
East	East's Reports.
Elph. Introd. . . .	Elphinstone's Introduction to Conveyancing (4th Ed.).
Elph. & Cl. Searches .	Elphinstone & Clark on Searches (1889).
Elph. N. & C. Interp. .	Elphinstone, Norton & Clark on Interpretation of Deeds (1885).
Elton, Cop. . . .	Elton's Law of Copyholds (2nd Ed.).
Eq.	Equity.
Eq. Ca. Ab. . . .	Equity Cases Abridged.
Ex.	Exchequer Reports.
Ex. D.	Exchequer Division (Law Reports).

Farw. Pow.	Farwell on Powers (2nd Ed.).
Fearne, C. R.	Fearne on Contingent Remainders.
Foa, L. & T.	Foa on Landlord and Tenant (2nd Ed.).
G. & J.	Glyn & Jameson's Reports.
Giff.	Giffard's Reports.
H. L. C. / H. L.	House of Lords Cases (Clark).
H. & C.	Hurlstone & Coltman's Reports.
H. & N.	Hurlstone & Norman's Reports.
Hare	Hare's Reports.
Hawk. Wills	Hawkins on Wills.
Hayes & Jarman	Hayes & Jarman's Concise Forms of Wills (10th Ed.).
Hood & Challis	Hood & Challis' Conveyancing and Settled Land Acts (4th Ed.).
Inst. / Instit.	Coke's Institutes.
J. & H. / Jo. & H.	Johnson & Hemming's Reports.
J. & Lat. / Jo. & Lat.	Jones & Latouche's Reports.
Jac.	Jacob's Reports.
Jac. & W.	Jacob & Walker's Reports.
Jarman	Jarman on Wills (5th Ed.).
Jenk. Cent.	Jenkins' Reports.
Jur.	Jurist (Reports).
K. & E.	Key & Elphinstone's Compendium of Precedents (5th Ed.).
K. & J.	Kay & Johnson's Reports.
Keb.	Keble's Reports.
Keen	Keen's Reports.
Kn.	Knapp's Reports.
L. J.	Law Journal Reports.
L. J. N. S.	,, ,, New Series.
L. R. C. P.	Law Reports, Common Pleas.
L. R. Ch.	,, ,, Chancery Appeals.
L. R. Eq.	,, ,, Equity.
L. R. Ex.	,, ,, Exchequer.
L. R. H. L.	,, ,, English and Irish Appeals to House of Lords.
L. R. P. C.	,, ,, Privy Council Cases.
L. R. P. & M.	,, ,, Probate and Divorce.
L. R. Q. B.	,, ,, Queen's Bench.
L. Q. R.	Law Quarterly Review.
L. T.	Law Times Reports.
Ld. Raym.	Lord Raymond's Reports.
Leake, Law of Prop. in Land	Leake's Digest of the Law of Property in Land (1874).
Leake, Us. & Prof.	Leake's Law of Uses and Profits of Land (1888).

Leon.	Leonard's Reports.
Lev.	Levinz's Reports.
Lewin	Lewin on Trusts (9th Ed.).
Lindley on Partn.	Lindley on Partnership (6th Ed.).
Litt.	Littleton's Tenures.
M. & G. / Man. & Gr.	Manning & Granger's Reports.
M. L. P. P.	Goodeve's Modern Law of Personal Property (2nd Ed.).
M. & S.	Maule & Selwyn's Reports.
M. & W.	Meeson & Welsby's Reports.
M. W. P. Act	Married Women's Property Act.
Macq. H. L. C.	Macqueen's Appeal Cases (Scotch).
Madd.	Maddock's Reports.
Mer.	Merivale's Reports.
Mod.	Modern Reports.
Moo.	Sir F. Moore's Reports.
Moo. P. C.	Moore's Privy Council Reports.
My. & C.	Mylne & Craig's Reports.
My. & K.	Mylne & Keen's Reports.
N. C.	New Cases.
N. R.	New Reports.
O. Bridg.	Orlando Bridgman's Reports.
P., preceded by date of year	Probate Division (Law Reports since 1890).
P. C.	Privy Council Cases (in Law Reports).
P. D.	Probate Division (in Law Reports).
P. & M. Hist.	Pollock & Maitland's History of English Law (1895).
P. W. / P. Wms.	Peere Williams' Reports.
Palm.	Palmer's Reports.
Perk. Prof. Bk.	Perkins's Profitable Book.
Ph.	Phillips' Reports.
Plowd.	Plowden's Reports.
Pre. Ch.	Precedents in Chancery.
Prest. Abst.	Preston on Abstracts of Title.
Pr. / Price	Price's Reports.
Prid.	Prideaux's Conveyancing Precedents (16th Ed.).
Q. B.	Queen's Bench Reports (Adolphus & Ellis, New Series).
Q. B., preceded by date of year	Queen's Bench Division (Law Reports since 1890).
Q. B. D.	,, ,, ,, (in Law Reports from 1875 to 1890).
R.	The Reports.
R. & M.	Russell & Mylne's Reports.
R. S. C.	Rules of the Supreme Court.
Rep.	Coke's Reports, Numbers refer to Parts, not to Volumes.
Roll. Ab.	Rolle's Abridgment.
Roll. Rep.	Rolle's Reports.

Roscoe, N. P.	Roscoe's Digest of the Law of Evidence at Nisi Prius (16th Ed.).
Russ.	Russell's Reports.
S. C.	Same Case.
S. L. A.	Settled Land Act.
S. L. R. Act	Statute Law Revision Act.
S. & S.	Simon & Stuart's Reports.
Salk.	Salkeld's Reports.
Sand. Us.	Sanders on Uses.
Sch. & Lef.	Schoales & Lefroy's Reports.
Scriv. Cop.	Scriven on Copyholds (7th Ed.).
Seton	Seton on Decrees (5th Ed.).
Shelford, Mortm.	Shelford on Mortmain.
Shelford, R. P. Stat.	Shelford's Real Property Statutes (9th Ed.).
Shep. T.	Sheppard's Touchstone.
Skeat, Etym. Dict.	Skeat's Etymological Dictionary (1882).
Show.	Shower's Reports.
Show. Parl. Ca.	,, Cases in Parliament.
Sid.	Siderfin's Reports.
Sim. / Sim. N. S.	Simon's Reports. / ,, ,, New Series.
Sim. & St.	Simon & Stuart's Reports.
Sm. & G.	Smale & Giffard's Reports.
Sm. L. C.	Smith's Leading Cases in Common Law (10th Ed.).
Smith, L. & T.	Smith's Landlord and Tenant (3rd Ed.).
Smith's Law of R. & P. Prop.	Smith's Compendium of the Law of Real and Personal Property (1884).
Sol. J.	Solicitor's Journal.
Spence	Spence's Equitable Jurisdiction of the Court of Chancery.
St. Tri.	State Trials.
St. Tri. N. S.	,, ,, New Series.
Stephen, Dig. Evid.	Stephen's Digest of Evidence (6th Ed.).
Str.	Strange's Reports.
Stroud, Jud. Dict.	Stroud's Judicial Dictionary (1890).
Stud. Prec.	Clark's Precedents in Conveyancing (2nd Ed.).
Sugd. Pow.	Sugden on Powers (8th Ed.).
Sugd. R. P. Stat.	Sugden on the Real Property Statutes (1862).
Sugd. V. & P.	Sugden on Vendors and Purchasers (1862).
Sw. / Swanst.	Swanston's Reports.
Sw. & Tr.	Swabey & Tristram's Reports.
T. L. R.	Times Law Reports.
T. R.	Term Reports (by Durnford & East).
T. Raym.	Sir Thomas Raymond's Reports.
Taunt.	Taunton's Reports.
Theob.	Theobald on Wills (4th Ed.).
Toth.	Tothill's Reports.
Tudor, Charit. Trusts	Tudor's Charitable Trusts (3rd Ed.).
Tudor, L. C R. P.	Tudor's Leading Cases on Real Property (3rd Ed.).
Tyr.	Tyrwhitt's Reports.
Tyssen, Charit. Bequests	Tyssen on Charitable Bequests (1888).

Ventr.	Ventris's Reports.
Vern.	Vernon's Reports.
Ves. Sen.	Vesey Senior's Reports.
Ves.	Vesey Junior's Reports.
Vin. Abr.	Viner's Abridgment.
W. B. & C.	Wolstenholme's Conveyancing Acts (7th Ed.).
W. Bl.	Sir W. Blackstone's Reports.
W. N.	Weekly Notes.
W. R.	Weekly Reporter.
W. & T. L. C.	White & Tudor's Leading Cases in Equity (6th Ed.).
Watkins, Conv.	Watkins' Principles of Conveyancing.
Watkins, Cop.	Watkins on Copyholds (4th Ed.).
Watson, Comp. Eq.	Watson's Compendium of Equity (2nd Ed.).
Wentworth on Exors.	Wentworth on Executors (14th Ed.).
Willes	Willes's Reports.
Wils.	Wilson's Reports.
Wms. Exors.	Williams on the Law of Executors (9th Ed.).
Wms. P. P.	Williams on Personal Property (14th Ed.).
Wms. R. P.	Williams on Real Property (18th Ed.).
Wms. Saund.	Saunders' Reports by Williams.
Y. B.	Year Book.
Y. & C.	Younge & Collyer's Reports.
Y. & C. C. C.	,, ,, Cases in Chancery.
Yelv.	Yelverton's Reports.
Y. & J.	Younge & Jervis' Reports.

THE MODERN LAW

OF

REAL PROPERTY.

CHAPTER I.

LAW—PROPERTY.

Chap. I.

"Law of England" (a).

THE subject of this book is the law of England relating to Real Property and Chattels Real.

In the expression "the law of England," the word "law" is used as including the whole body of law in force in England; viz., (1) Common law; (2) Customary law; (3) The law Merchant, or custom of Merchants; (4) Statute law; (5) the Prerogatives of the Crown; (6) the Privileges of Parliament; (7) Equity; (8) parts of the Canon law.

"Law."

But the word "law" is frequently used by lawyers in contradistinction to "Equity," and when so used it denotes those branches of the law of England which, before the 1st November, 1875 (b), were administered by the Common Law Courts (c) at Westminster, that is to say, Common law, Customary law, and the law Merchant.

"Common law."

The term "Common law" is also used in contradistinction to customary law or to Statute law. We distinguish, for example,

(a) See Co. Litt. 11 b.

(b) The time appointed by the Supreme Court of Judicature (Commencement) Act, 1874 (37 & 38 Vict. c. 83), as the day on which the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66) was to come into operation.

(c) The Courts of (King's or) Queen's Bench, the Court of Common Pleas (sometimes called the Common Bench), and the Court of Exchequer. While the Courts sat in Westminster Hall itself, the Court of Chancery was on one side of the Hall, and the Courts of King's Bench and Common Pleas on the other; hence the phrase "On the other side of Westminster Hall" when used by a common lawyer meant equity, and *vice versâ*. The Court of Exchequer sat in a building now destroyed adjacent to the Hall.

Chap. I.

between descent according to the common law and descent according to a custom, and between conveyances operating at common law and those operating under the Statute of Uses. It is perhaps impossible to give a strict definition of the term "Common law," as so used. It appears to mean the unwritten law which has been in force (in theory, at least) from time immemorial throughout England, except so far as it is excluded by local custom.

"Customary law."

Customary law is law which has prevailed from time immemorial in certain places only. Examples are afforded by the law regulating dealings with copyholds, which varies according to the customs of the different manors of which the copyholds are holden.

"Law Merchant."

Law Merchant is that part of the law regulating trade which is neither common nor statute law (*d*).

"Prerogative Privilege."

The Prerogatives of the Crown and the Privileges of Parliament are special laws affecting the Crown and the Houses of Parliament respectively, and are not embodied in statutes.

"Equity."

Equity is that branch of the law of England which, before the 1st November, 1875, was administered by the Court of Chancery, and some other Courts having local jurisdiction in equity (*e*). It was entirely ignored by the Common law Courts.

"Canon Law."

Canon law, so far as it remains in force, regulates the clergy and questions as to marriages and legitimacy.

The whole of the English law, with the exception of statute and canon law, is unwritten; that is to say, it can only be ascertained from the decisions of the Courts; but some few old text books are considered as authorities (*f*).

Common Law.

Although common law has existed in theory from time immemorial, instances can be found where, as a matter of fact, it has been altered by judicial decision. In such cases the theory is that the law always existed in the form declared by the decision, and that any earlier and inconsistent decision was erroneous, so that it is impossible to prove that a rule is not

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(*d*) Co. Litt. 182 a.

(*e*) The Court of Exchequer formerly had jurisdiction in equity; but this jurisdiction was abolished in 1841 by 5 Vict. c. 5. By the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), a limited jurisdiction in equity was given to the Superior Courts of Common Law and to certain Courts having local jurisdiction.

(*f*) *E.g.*, Coke's Institutes (the First Institute is generally known as "Coke upon Littleton," and is a commentary on Littleton's Treatise of Tenures); Sheppard's Touchstone.

good common law merely by shewing its origin within the time of legal memory.

Custom.

Where it is alleged that a custom exists, and that therefore the common law is excluded, proof of the alleged custom must be given (*g*). As a custom to be good must have existed before the commencement of legal memory (*h*), proof of its origin within that time shews that it is not a good custom.

Law Merchant.

As to the Law Merchant:—

"The law merchant forms a branch of the law of England; and those customs which have been universally and notoriously prevalent amongst merchants, and have been found by experience to be of public use, have been adopted as part of it upon a principle of convenience and for the benefit of trade and commerce; and, when so adopted, it is unnecessary to plead and prove them. They are binding on all without proof (*i*).

"There may be some questions depending on customs amongst merchants, where, if there be a doubt about the custom, it may be fit and proper to take the opinion of merchants thereupon. Yet that is only where the law remains doubtful, and even there the custom must be proved by facts, not by opinion only, and it must also be subject to the control of law" (*j*).

Statutes.

Every person is supposed to know the contents of a public statute, which therefore requires no proof; but for greater certainty, a printed copy may be referred to (*k*). If there is any doubt as to the accuracy of the copy, it may be compared with the Parliament Roll (*l*).

Acts of Parliament which are not public, *i.e.*, local and personal Acts, or private Acts, can be proved by producing a copy purporting to be printed by the Queen's printer (*m*).

The method of proving Acts which are not printed by the Queen's printers (which is sometimes the case with respect to Acts of a strictly personal nature, as an Act for dissolving a

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(*g*) As to the distinction between the customs of Gavelkind, Borough English, and other customs, see Co. Litt. 175 b; *Clements* v. *Scudamore*, 2 Ld. Raym. 1025; *Crosby* v. *Hetherington*, 4 Man. & Gr. 946; *Rider* v. *Wood*, 24 L. J. (N. S.) 737, 1 K. & J. 644.

(*h*) The first day of the reign of Richard the First (2nd Instit. 239), 3rd September, 1189.

(*i*) *Per* Lord Denman, C.J., *Barnett* v. *Brandao*, 6 Man. & Gr. at 665.

(*j*) *Per* Wilmot, J., *Edie* v. *East India Co.*, 2 Burr. 1226. As to the history of the Law Merchant see the Introduction, by Master Macdonell, to the 10th ed. of Smith's Mercantile Law.

(*k*) See Hardcastle on the Statute Law, 2nd ed., pp. 40, 50, as to the authentication of statutes; and as to their classification, *ib.*, Ch. IV., pp. 62, *et seq.*

(*l*) *Rex* v. *Jeffries*, Str. 446.

(*m*) The Evidence Act, 1845, 8 & 9 Vict. c. 113.

Chap. I.

marriage) is to produce an examined copy, *i.e.*, a copy proved by oral evidence to have been examined with the original and to correspond therewith.

Prerogative. Privilege.

The Prerogatives of the Crown (*n*) and the Privileges of Parliament (*o*) are taken judicial notice of. A distinction between prerogative and privilege appears to be that nothing is recognized as prerogative but that which can be proved by precedent to be so; but on the other hand it is very doubtful whether a Court of law would at the present day deny that to be privilege which is claimed as such by either House of Parliament. In practice no conflict is likely to arise, as the House of Commons enforces its privileges by committing any person who violates them by warrant, merely stating that he has "been guilty of contempt and breach of privilege," and the Courts will not inquire into the merits of such commitment (*p*).

Equity.

The rules of Equity can be ascertained only from the reported decisions of Courts of Equity.

Canon Law.

Canon law is written law (*q*). Even before the Reformation and on matters purely ecclesiastical, the Common law differed in some cases from the Canon law, and in these cases the Common law prevailed (*r*). It was provided by 22 Hen. VIII. c. 19, s. 7, "That such canons constitutions ordinances and Synodals provincial being already made which be not contrariant or repugnant to the laws statutes and customs of this realm nor to the damage or hurt of the King's prerogative royal shall now still be used and executed as they were afore the making of this Act till such time as they be viewed searched or otherwise ordered and determined" by a commission to be appointed under the Act (which has never been done).

That part of the Canon law which is in force in England,

(*n*) *Rex* v. *Elderton*, 2 Ld. Raym. 980.

(*o*) *Lake* v. *King*, 1 Wms. Saund. 131 b; *Stockdale* v. *Hansard*, 9 Ad. & El. 1, 11 Ad. & El. 253; *Cassidy* v. *Steuart*, 2 Man. & Gr. 437; the *Case of the Sheriff of Middlesex*, 11 Ad. & El. 273; *Sims* v. *Marryat*, 17 Q. B. 292; *Re Long-Wellesley*, 2 St. Tri. (N. S.) 911; S. C. 2 R. & M. 639; and cases there cited.

(*p*) The *Case of the Sheriff of Middlesex*, 11 Ad. & El. 223.

(*q*) A list of the works containing Canon law will be found in 4 L. Q. R. 358. As to its authority in England and its relation to the Common law, see *Reg.* v. *Millis*, 10 Cl. & F. 534, 678, 680—682, where Tindal, C.J., delivered the opinion of twelve Judges; and see a good summary in an American work, Bishop's Law of Marriage and Divorce, 6th ed., Bk. II., Ch. III., § 48, *et seq.*; Bishop's New Commentaries, Bk. II., Ch. VII.

(*r*) See the cases collected 3 L. Q. R. 46.

together with some parts of the Statute law affecting the Clergy especially, is sometimes called the Ecclesiastical law (*s*).

Property.

Property.

"Property" is an ambiguous term; for it may denote either the things which are the objects of rights or ownership, or the rights over or ownership of such objects.

When a man by his will gives all his "property," he means all his lands, houses, consols, investments, money, and the debts owing to him, in fact, everything belonging to him (*t*). The term "property" may thus denote the things in respect of which the owner has rights of use or enjoyment and disposal. But, when the subject which is being dealt with is not the thing itself, but the interest of a person in it, the term "property" may denote merely the extent of that interest, or, in other words, the rights of that person in relation to the thing. Thus, in the same piece of land there may be various proprietary interests: one person may be a tenant of it for a term of years, that is, may have the right to occupy or use it or to take the rents and profits of it during that term; another may, subject to this term, have an interest in it for his life; and a third may have the absolute interest in it, subject only to the exhaustion of the two preceding estates or interests, those, namely, of the tenant for the term and of the tenant for life. The estate or interest of each person is his proprietorship or property (*u*) in the thing—something plainly different from the thing itself. It is with the regulation of the interest or proprietorship of persons in things that the Law of Property deals (*w*). By Blackstone and other text

(*s*) *Mackonochie* v. *Penzance*, 6 App. Cas. 446. The Canons of 1603 bind the clergy, but do not bind the laity. *Exeter (Bishop of)* v. *Marshall*, L. R. 3 H. L. 17.

(*t*) The aggregate of his faculties, rights or means; Austin's Jurisp. Stud. Ed. (1893), p. 385 (Lect. xlvii.).

(*u*) The old books commonly speak of the "propriety" or ownership of the soil. See, *e.g.*, Hale de Jure Maris, reprinted in 1 Hargrave's Law Tracts. As to the meaning of the Latin word "*proprietas*" see Spelman Gloss. s. v.

(*w*) *I.e.*, it deals with "Property" in the sense of the rights of persons over things as distinguished from "Property" in the sense of the things which are the subjects of those rights. As to the different meanings of the word "Property," see Wms. R. P. (18th ed.), p. 3, referred to with approval by Chitty, J. (*In re Earnshaw-Wall*, [1894] 3 Ch. 156), who observes that "'Property' may denote the thing to which a person stands in a certain relation, and also the relation in which the person stands to the thing." Austin's Jurisp. (4th ed.), Lect. xiv., p. 382; Lect. xlvii., pp. 817—820 (Stud. Ed., [1893] pp. 177, 383—385). Austin observes, that

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writers (*x*) this branch of the law is treated of under the head of Rights of Property or Rights of Things,—"those rights which a man may acquire in and to such external things as are unconnected with his person;" as opposed to the Rights of Persons or "such rights and duties as are annexed to the persons of men" (*y*).

Movable and immovable.

Things—the objects of rights or interests—have been differently classified. In the early ages of Europe property was chiefly of a substantial and visible, *i.e.*, a corporeal, kind: under the Roman Law things corporeal were divided into movable and immovable (*z*). In England a different classification prevailed—namely, into "lands, tenements, and hereditaments" on the one hand, and "goods and chattels" on the other—terms still in use, to which we shall presently advert. In modern times, property generally has been classified into "real and personal." But the classification into "movable and immovable," which is the more natural, alone corresponds with an essential difference in the subject-matter (*a*). The classification into "real and personal" owes its origin to the technical names given to the remedies formerly given by the English law to persons deprived of their

Lands, tenements, and hereditaments.

Goods and chattels.

Real and personal.

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in English law the term "Property," in the sense of ownership, is applied to movables only, the term "Estate" being used when the subject-matter is immovable, *i.e.*, land. (An instance of the ambiguous use of the word "Property" will be found in s. 55 of the Bankruptcy Act, 1883; see the remarks of Lindley, L.J., in *In re Finley*, 21 Q. B. D. 475, at p. 484.) The reader is referred to the Appendix (p. 297) to Part I. of Digby, R. P., for a discussion of "The place of the Law of Real Property in the English System." See as to the difference between "Property" and a mere *spes successionis*, *Re Parsons*, *Stockley* v. *Parsons*, 45 Ch. D. 51, where Kay, J., cites the judgment of Lord Eldon in *Dursley* v. *Fitzhardinge*, 6 Ves. 251, 260, drawing a distinction between an "expectation" (*spes successionis*) and an "expectancy," in the legal sense. See *Allcard* v. *Walker*, [1896] 2 Ch. 369, 380.

Expectation.
Expectancy.

(*x*) See 1 Bl. 118; and the criticism of Austin (Lect. xl.), who says: "The Law of Persons is that part of the law which relates to *status* or conditions. The Law of Things, like the Law of Persons, relates to rights and duties, but to rights and duties considered generally and in the abstract, exclusively of the rights and duties which are the constituent elements of conditions or *status*. . . . Much, therefore, of the Law of Persons relates to things, properly so called, while much of the Law of Things does not. . . . The Law of Things is the *corpus juris*, minus the law of *status* or conditions. The Law of Persons is the law of *status* or conditions, detached for convenience from the body of the entire legal system."

(*y*) 2 Bl. 1. Austin in several places remarks upon the absurdity of translating "*Jus Rerum*," "*Jus Personarum*," as "Rights" of Things and of Persons.

(*z*) Institutes of Justinian, by Sandars, 8th ed., p. 45 of Introduction. See *post*, p. 17. Sir H. Maine (Early Law and Custom, Ch. X.) observes that this classification is, in the Roman Law, comparatively modern.

(*a*) Maine's Ancient Law, 15th ed., p. 273.

property. Where the possession of land was wrongfully withheld from its rightful owner, the remedy was an action for the thing itself, termed a real action (*actio in rem*) (*b*), because the *res* or land itself would be recovered; whilst, in the case of a wrongful withholding or deprivation of goods, the remedy was an action (*actio in personam*) (*c*), in which only a personal duty could be enforced—viz., payment of damages.

Real actions.

Real actions, the forms of which were various and complicated (*d*), together with "mixed actions," were, with the exception of four, namely, the writ of right of dower, writ of dower *unde nihil habet*, *quare impedit*, and ejectment (*e*), abolished by the Real Property Limitation Act, 1833, s. 36 (*f*); those which remained, of which the most important was the action of ejectment, were completely remodelled by the Common Law Procedure Act, 1860 (*g*). Ejectment (*ejectio firmæ*) had been, until the end of the 15th century, a personal action by a tenant for a term of years claiming damages for ouster from the land demised; it being then resolved by the Judges that the land also might be recovered, ejectment became the ordinary mode of enforcing a right of entry (*h*). It was brought ostensibly

Action of ejectment.

(*b*) Co. Litt. 285 a. See Digby, R. P., p. 71. As to the meaning of "action," see 2nd Inst. 40, *Edward Altham's Case*, 8 Rep. 105 b.

(*c*) See Wms. R. P., pp. 23, *et seq.*, as to Real actions and Personal actions. If the plaintiff recovered in a real action, a writ was directed to the sheriff of the county, commanding him to give the plaintiff seisin, *i.e.*, possession, of the land so recovered. In personal actions the judgment was that something be done or rendered by the defendant; and in order to compel him so to do and to see the judgment executed, a special writ of execution issued to the sheriff according to the nature of the case. But even in an action of detinue, *i.e.*, for the specific recovery of personal chattels unjustly detained, the wrong-doer could not be compelled to a restitution of the identical thing taken or detained; he had his election to deliver the goods or their value; "an imperfection in the law," Blackstone remarks, "that results from the nature of personal property, which is easily concealed or conveyed out of the reach of justice; and not, like land and other real property, always amenable to the magistrate." (3 Bl. 413.) This imperfection, however, was partially removed by the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 78, which deprived the defendant, where the chattel was forthcoming, of the option of giving it up or paying the value whenever the plaintiff deemed money to be an inadequate compensation for the loss to him of the chattel. This section, having been embodied in R. S. C. Order XLVIII., was repealed by 46 & 47 Vict. c. 49. See on this subject the remarks of Lord Macnaghten, in *Peruvian Guano Co.* v. *Dreyfus Brothers & Co.*, [1892] A. C. 176; 4 L. Q. R. 394; P. & M. Hist. ii. 173.

(*d*) See Booth on Real Actions.

(*e*) Ejectment was accounted a mixed action, because by it both possession of the land and also damages were recovered.

(*f*) 3 & 4 Will. IV. c. 27, s. 36; they are there enumerated, and see 3 Bl. Ch. 10, for an account of them.

(*g*) 23 & 24 Vict. c. 126.

(*h*) Digby, R. P., 4th ed., pp. 175, *et*

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rather to recover possession of the land than to assert a title to it which should be altogether indefeasible. For, the law considering the person in possession as owner until the contrary is proved (*i*), the plaintiff recovered by the strength of his own and not by the weakness of the defendant's title; should he succeed, he in turn might be ejected by another shewing a still better title (*j*). Now under the Judicature Act there is no special action of ejectment, and in the High Court an action for the recovery of land proceeds, with a few exceptions, in like manner to any other action. The County Courts, under the County Courts Act, 1888, have jurisdiction in ejectment where neither the value nor the rent exceeds £50 per annum (*k*).

Personal Property.

As to Personal Property Blackstone says (*l*) :—

"Things personal are goods, money, and all other movables which may attend the owner's person wherever he thinks proper to go."

But this is not a correct definition, and, as a fact, goods and chattels were not usually called things personal till they had become too numerous and important to attend the persons of their owners. As Sir H. Maine has observed (*m*) :—

"The lawyers of all systems have spared no pains in striving to refer these classifications to some intelligible principle, but the reasons of the severance must ever be vainly sought for in the philosophy of law : they belong not to its philosophy, but to its history."

The same learned writer observes (*n*) :—

"In all the countries governed by systems based on the French codes, that is, through much the greatest part of the continent of Europe, the law of movables, which was always Roman Law, has superseded and annulled the feudal law of land. England is the only country of importance in which this transmutation, though it has gone some way, is not nearly accomplished."

Lands, tenements, and hereditaments.

Although the classification of property into "real and personal" is the prevailing one in modern English law, in

seq.; Lightwood on Possession of Land, Ch. VI., p. 104. The nature and course of the proceedings are exhibited in the Appendix No. II. to Bl., vol. iii. See also the pleadings in *Pelham's Case*, 1 Rep. 3 a.

(*i*) That possession is *primâ facie* evidence of seisin in fee simple, see *Lyell* v. *Kennedy*, 8 App. Cas. at p. 232; Best on Evidence (8th ed.), p. 337, § 366; Williams on Seisin, p. 7, cited by James, L.J., in *Leach* v. *Jay*, 9 Ch. D. at p. 44. Cf. R. S. C. Order XXI. r. 21.

(*j*) Broom's Comm., 868.

(*k*) 51 & 52 Vict. c. 43, s. 59.

(*l*) Vol. ii., p. 16.

(*m*) Maine, Ancient Law (15th ed.), c. 8, p. 274.

(*n*) *Ib.* 283.

the earlier period of its history what is now usually referred to as real property was comprehended under the three general heads, Lands, Tenements, and Hereditaments; what is now spoken of as personalty being distinguished by the term Goods and Chattels. These terms are still recognized, and are commonly used in deeds; it is therefore necessary to understand what is meant by and comprised in them. All know what, in a popular sense, is meant by the word "land." But this popular sense of the word "land" is not so extensive as its legal meaning, which includes not only the mere surface soil, but all above and below it (*o*). Thus, a structure on the land, as a house (*p*), or trees growing out of it, are legally included under the term "land," and so is everything lying beneath its surface, as ores, fossils (*q*), mines, &c. Where land is covered by water, it is not correct to say that a grant of the land passes a right to the water, for there is no property in water (*r*); but a grant of the land carries with it all rights in respect of the use of the water, subject to such rights, if any, as are vested in third persons. A grant of water, without the land covered by it, passes a right of fishery only (*s*).

Land.

But the more extensive meaning of the word "land" may be cut down by the context in which it is used, as, where "land" is spoken of in plain contradistinction to houses, it will not be

(*o*) "By the grant of the land or ground itself all that is *supra*, as, houses, trees, and the like, is granted, for '*cujus est solum, ejus est usque ad cœlum;*' and also all that is *infra*, as mines, earth, clay, quarries, and the like." Shep. T. 90. Sheppard's Touchstone is now admitted to have been the work of Mr. Justice Doderidge. Sheppard is said to have purchased the Judge's library after his death in 1628, and this manuscript of the Touchstone was found in it. (See Preston's Edition, —his address to the reader, and Hilliard's address.) Parke, B. (*Horsfall* v. *Hey*, 2 Ex. at p. 781), observed that Sheppard's Touchstone "is entitled to the utmost respect as one of the first authorities in the law."

(*p*) *Allaway* v. *Wagstaff*, 4 H. & N. 307.

(*q*) *E.g.*, coprolites; *A.-G.* v. *Tomline*, 5 Ch. D. 750. See also *Elwes* v. *Brigg Gas Co.*, 33 Ch. D. 562, in which the question was discussed (but not decided) whether a prehistoric boat embedded in the soil was in point of law to be considered as a mineral or as part of the soil or as a chattel.

(*r*) "Water is a movable wandering thing, and must of necessity continue common by the law of nature, so that I can only have a temporary transient usufructuary property therein; wherefore if a body of water runs out of my pond into another man's, I have no right to reclaim it, but the land which that water covers is permanent, fixed, and immovable, and, therefore, in this I may have a certain substantial property, of which the law will take notice and not of the other." 2 Bl. 18. See also Co. Litt. 4 a and 4 b.

(*s*) 4 Cruise, Dig., p. 268; *contrà*, of a gift of a pool; Co. Litt. 5 a.

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taken to comprise them; so mines lying under a piece of land may be excepted out of a conveyance of such land. On the other hand, under a gift or grant of a "house," or, of a "messuage," land commonly occupied with it will not pass unless immediately annexed to and enjoyed with the house, as out-buildings, orchard, garden, and curtilage (or courtyard) (*t*).

A railway company, purchasing land under the Railways Clauses Consolidation Act, 1845 (*u*), are not entitled to the minerals unless expressly purchased, and minerals are deemed to be excepted out of the conveyance unless expressly named and conveyed.

"Land" in Statute.

In various Acts of Parliament the word "land" has special meanings assigned to it, but only in each case for the purposes of the particular Act. Thus, in the Conveyancing and Law of Property Act, 1881 (*y*), "land," unless a contrary intention appears, includes land of any tenure, and tenements and hereditaments, corporeal or incorporeal, and houses and other buildings. A general enactment is contained in the Interpretation Act, 1889 (*z*), which provides that, in every Act passed after the year 1850, the expression "land" shall, unless the contrary intention appears, include messuages, tenements, and hereditaments, houses and buildings, of any tenure.

Tenement.

The word "tenement" in its strict legal signification, is something which may be holden, that is, be the subject of tenure, but popularly it is often applied to designate houses or other buildings. Thus a house is commonly described in a deed as "all that messuage or tenement" (*a*). In Acts

(*t*) Shep. T. 94; Co. Litt. 5 b, 56 b; Cruise, Dig., vol. iv., p. 267; and see the authorities cited in Elph. N. & C. Interp., p. 588 (s. v. *House*) and p. 602 (s. v. *Messuage*). See further, as to the meaning of the word "land," Co. Litt. 4 a, 19 b, and authorities cited in Elph. N. & C. Interp., Glossary, p. 590, s. v. *Land;* Challis, R. P. 41. In the year books and old records "*terra*" is regularly used to denote arable land only, as distinguished from meadow, pasture, &c.; see 4 Cruise, Dig. 267; Shep. T. 13; *ib.* 92; Wms. R. P., Appx. F., p. 642. In *Silly* v. *Silly*, 1 Ventr. 260, it is said that, in pleading, "land" signifies arable only, but that in a grant it may extend to meadow, pasture, &c.; and so in *Skinner* v. *Newton*, 10 Mod. 170; *Jackson* v. *Laveright*, *ib.* 186.

(*u*) 8 & 9 Vict. c. 20, s. 77. See, as to what minerals are within the section, *Midland Ry. Co.* v. *Robinson*, 15 App. Cas. 19, and cases there cited. There are similar provisions in the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 18, and in the Land Tax Redemption Act, 1802 (42 Geo. III. c. 116), s. 80, as to land sold by an Ecclesiastical Corporation for the Redemption of Land Tax.

(*y*) 44 & 45 Vict. c. 41, s. 2 (ii).

(*z*) 52 & 53 Vict. c. 63, s. 3, replacing a similar provision in s. 4 of the repealed Act 13 & 14 Vict. c. 21 (known as Lord Brougham's Act). See 34 Sol. J. 688.

(*a*) See 2 Dav. Prec. ii. 237.

of Parliament the word "tenement" is sometimes used to mean a house (*b*); in an assurance it may pass not only the land itself, but certain interests arising out of it (*c*); for example, a rent issuing, as it is technically termed, out of the land, payable by the holder of the land to another; a right of common of pasture, that is, to turn out cattle to pasture on the land of another; a right of turbary, that is, to take, from another's soil, turf fit for burning (*d*).

Hereditament.

The word hereditament "is the largest word of all in that kind," says Lord Coke, "for whatsoever may be inherited is a hereditament, be it corporeal or incorporeal, real or personal, or mixed" (*e*).

Chattels annexed to land.

Among hereditaments the English law recognizes some chattels which are considered, either by the Common law or by special local custom, as annexed to the inheritance and descendible to the heir. Chattels of this nature cannot be separated from the inheritance by will (*f*), though the owner may during his lifetime sell or dispose of them. Thus at Common law, deer in a lawful park (*g*) unless they have been reclaimed (*h*), fish in a pond, rabbits in a warren, doves in a dovecot, muniments of title of an estate of inheritance (*i*) and the chest or box containing them (*k*), pass to the heir with the land.

Heirlooms.

Where the enjoyment of chattels is annexed to a mansion or land by special local custom so as to devolve with the

(*b*) See instances in *Yorkshire Fire and Life Insurance Co.* v. *Clayton*, 8 Q. B. D. 421; *Dashwood* v. *Ayles*, 16 Q. B. D. 295.

(*c*) The question whether leaseholds for years are tenements is discussed in the L. Q. R., vol. v., p. 326, and vol. vi., p. 69.

(*d*) Co. Litt. 6 a, 19 b; Challis, R. P. 43; Elph. N. & C. Interp. 621.

(*e*) Co. Litt. 6 a. It has been observed that "the word *hereditament*, when used in relation to land, sometimes denotes the land itself as a physical object, and sometimes the estate in the land." (Challis, R. P. 44.) In *Tomkins* v. *Jones*, 22 Q. B. D. 599, it was said by Bowen, L.J., that in s. 56 of the County Courts Act, 1888, "it is not used as describing the quantum of interest in the subject-matter, but as describing the subject-matter itself, namely, the land;" and that therefore in that section it includes leaseholds. It is so used in the common phrase, "leasehold hereditaments."

(*f*) Co. Litt. 185 b.

(*g*) *The Case of Swans*, 7 Rep. at 17 b. As to the meaning of "Park" see Elph. N. & C. Interp. 606, s. v. "Park."

(*h*) *Morgan* v. *Abergavenny*, 8 C. B. 768; *Ford* v. *Tynte*, 2 J. & H. 150.

(*i*) See the cases collected 33 Sol. J. 655.

(*k*) Godolphin, Pt. II., c. 14, s. 1; Wentworth on Exors. 156. It has been said that the executor shall have the chest unless it is sealed [locked?]. *The Case of Mines*, Plowd. at 323 a. Shep. T. 470, and the authorities there cited. Vin. Abr. Executors U. 7.

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inheritance, such chattels are called "heirlooms" (*l*). The term "heirloom" is not uncommonly applied to chattels annexed to the inheritance by the Common law. It is also applied to pictures, plate, or furniture, directed by will or settlement to go with a mansion or estate. This use of the term is not strictly correct; for chattels so settled devolve upon the personal representative (and not the heir) of the first person who takes a vested estate of inheritance (*m*).

Mr. Challis says (*n*):—

Personal hereditaments.

"The phrase hereditaments personal (or personal hereditaments) includes certain inheritable rights, either having no connection with lands, such as a personal annuity granted for an estate of inheritance, see *Turner* v. *Turner*, Ambl. 776; or having a connection which implies no participation either in the land or its profits; also annuities granted in fee by the Crown out of the Barbados duties, see *Earl of Stafford* v. *Buckley* (*o*), and certain other annuities charged upon public revenue, see *Lady Holdernesse* v. *Marquis of Carmarthen* (*p*); and the term also includes certain offices of dignity or trust which admit of being granted in inheritance, but are attached to the person of some superior dignitary, or are to be exercised only in respect to chattels, as a mastership of hounds."

a. Corporeal.
b. Incorporeal.

Hereditaments are divided into corporeal and incorporeal; the former being "such as affect the senses, and may be seen and handled by the body," as land, houses, and so forth; the latter "such as are not the object of sensation, can neither be seen nor handled, are creatures of the mind, and exist only in contemplation"—for example, a rent or annuity payable out of land; a right of fishing in a particular stream, or the benefit of the flow of a particular stream; a right of way or of common; an advowson, that is, a right to present a priest to the emoluments of a church; the right to light and air free

(*l*) Co. Litt. 18 b. As to heirlooms see 1 Cruise, Dig. 46, ss. 5, 6; Leake, Us. & Prof. of Land, 36; P. & M. Hist. ii. 361. The meaning of "loom" appears to be furniture; see Skeat, Etym. Dict., s. v.; and this agrees with the examples given in Co. Litt. 18 b. See also 4 Cruise, Dig. 268, s. 52; Wms. P. P. 125, 126. See for an instance of the origin of heirlooms, 2 Literæ Cantuarienses (Rolls Series), 411. Probably no heirlooms, strictly so called, now exist.

(*m*) See Wms. Exors., Pt. II., Bk. II., c. 2, § iii.; *Fane* v. *Fane*, 2 Ch. D. 712; *D'Eyncourt* v. *Gregory*, 3 Ch. D. 635; Elph. Introd. 395; Wms. P. P. 382; and Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 37 (where in the marginal note the word is used in the popular sense: see the note in the 4th Edition of the Act by Messrs. Hood and Challis). For a form of such a settlement, see Dav. Conc. Prec. cxlii. 16th ed., at p. 552; 2 K. & E. 620.

(*n*) R. P. 46. See 16 Vin. Abr. 109.

(*o*) 2 Ves. Sen. 170.

(*p*) 1 Bro. C. C. 377.

from any obstruction from the occupier of the adjoining land(*q*).

Condition.

The benefit of a condition annexed to an estate is a hereditament; for example, if an estate be granted to another,

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(*q*) Mr. Challis (R. P. 47)observes that "Corporeal hereditaments are fixed as to their definition by the legal maxim that at common law" (*i.e.*, apart from the Act 8 & 9 Vict. c. 106, s. 2) "they lie in livery and not in grant. The phrase therefore includes only lands regarded as a physical object,and legal estates of inheritance in possession. The only conveyance *in pais*—that is, made between party and party, and not matter of record, as a fine or recovery—by which these could at common law be conveyed to a stranger, was a feoffment, and the essence of a feoffment is the livery of the seisin. All other hereditaments to which applies the description *tangi non possunt nec videri*, are included under the term *incorporeal* hereditaments. These are said at common law to lie in grant; because they would pass by the mere delivery of a deed purporting to convey them, and the word *grant* was the most appropriate (though not the only) word of conveyance for the purpose." See Co. Litt. 9 a; 3 Cruise, Dig. 1; Wms. R. P., pp. 4, 30. The classification into corporeal and incorporeal hereditaments has been adversely criticised by Austin (Jurisp., 4th ed., 371, 708, 804) as being based on a confusion between rights and things which are the subjects of rights. "If," he says, "the hereditament mean the right itself, that is always incorporeal, not less in the case of what are called corporeal than what are called incorporeal hereditaments. If the hereditament mean the subject of the right, the subject of an incorporeal hereditament is as corporeal as the subject of a corporeal hereditament." See Digby, R. P., p. 304, note (2).

The author's text includes easements among the examples of incorporeal hereditaments. It is, however, sometimes said that easements are not incorporeal hereditaments, but rights appurtenant to corporeal hereditaments; and if this be not accepted as a general proposition, yet it is to be observed that for the purposes of particular statutes, it must not be assumed that easements are included under terms, such as "land," though defined to include hereditaments. For example, the Lands Clauses Consolidation Act, 1845 (s. 3), enacts that the word "lands" shall in that Act extend to "messuages lands tenements and hereditaments of any tenure;" and confers powers for the compulsory purchase of lands, and therefore for the acquisition of an easement actually or reputed to be appurtenant to the land taken, but it does not enable an easement which does not exist either actually or by reputation at the date of the purchase to be acquired. *G. W. Ry. Co.* v. *Swindon, &c., Ry. Co.*, 22 Ch. D. 677; 9 App. Cas. 787. None of the judgments however contain anything to suggest that easements are not in their nature hereditaments, and the language of the learned Judges appears to assume that they are. In *Jones* v. *Watts*, 43 Ch. D. 574, Cotton, L.J., said that "a right of way is certainly a hereditament," and Lindley, L.J., appears to agree with him. It must be remembered that, though it is doubtful whether easements, properly so called, can exist except as appurtenant (see Digby, R. P. 181 *n.*, *Bailey* v. *Stephens*, 12 C. B. (N. S.) 91, 111; *Ackroyd* v. *Smith*, 10 C. B. 164; *Hawkins* v. *Rutter*, [1892] 1 Q. B. 668; Leake, Us. and Prof. 190; Shelford, R. P. Stat., 9th ed., p. 5), or can be conveyed except together with the tenement to the enjoyment of which they are annexed, yet certain rights in the nature of easements, not being in the legal sense "appurtenant," are so far treated as independent subjects of ownership that, whether they do or do not pass to the grantee of that tenement, depends on whether apt words of conveyance are used describing them as separate from and as an addition to the principal subject-matter of the grant; see Wms. R. P. 398, 399; Elph. N. & C. Interp., Ch. XIII.

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subject to a condition, on failure of which it is to revert to the grantor, the benefit of this condition devolves upon the heir (*r*). So also titles of nobility devolving on the heir are hereditaments (*s*).

Goods and chattels.

"Goods and chattels" (*t*) at the period when these terms were introduced into English Law were intended to embrace all property not comprised under one or other of the terms Lands, Tenements, and Hereditaments; and they are used in that sense to the present day as equivalent to Personalty.

The precise origin of the term "chattel" is left in some obscurity. Lord Coke says (*u*), "'Goods,' *biens*, *bona*, includes all chattels, as well real or personal. 'Chattels' is a French word, and signifies goods which by a word of art we call *catalla*."

Blackstone (*x*) says that in the Grand Coustumier of Normandy the word "chattels" is used, and set in opposition to a fief or feud; so that, not only goods, but whatever was not a feud, were accounted chattels. The word "chattels" was intended to designate animals, furniture, coins, jewels, corn, garments, and everything else that can be transferred from place to place (*y*). In later times it came to be applied to such things as debts, shares in companies, patents, and copyrights. Things of this kind are in the nature of incorporeal chattels. They have been styled Choses in Action, while corporeal chattels have been termed Choses in Possession. It is very difficult to frame any satisfactory definition of the term "Chose in Action" (*z*); and it may be sufficient here to describe a Chose in Action as a right of action to recover money or to enforce some legal obligation. It is a moot point whether it includes a right of action for damages in respect of an injury to property. The most common instance of a Chose in Action is a right to recover money in respect

Choses in action.

Choses in possession.

(*r*) *Winchester's Case*, 3 Rep. 2b; and see Challis, R. P. 175, 192.

(*s*) See *Re Rivett-Carnac*, 30 Ch. D. 136, where it was held that a dignity or title of honour (including a baronetcy), whether it be granted of a place or not, is an incorporeal hereditament. See also Challis, R. P. 45—47. For the difference between dignities and land, see *The Devon Peerage Claim*, in St. Tri. (N. S.), vol. ii. 659; also 5 Bli. (N. S.) 220; 2 Dow & Cl. 200.

(*t*) As to what passes by "goods and chattels," in a grant, see Shep. T. 97, 98, and in a will, *Kendall* v. *Kendall*, 4 Rep. at 370.

(*u*) Co. Litt. 118 b.

(*x*) 2 Bl. 385.

(*y*) *Ib.* 387.

(*z*) See the subject discussed in L. Q. R., vol. ix., 311; x., 143; *ib.* 303; xi., 64; *ib.* 223; *ib.* 238; M. L. P. P., p. 134.

of a debt. Where a right of action is assignable it has an exchangeable value, and may therefore be treated as a subject of property. Formerly Choses in Action could not be assigned for it was considered that the transfer of a law suit would unduly encourage litigation (*a*); and, until the Judicature Act, 1873, except in the case of negotiable instruments, and some other contracts made assignable at law by various statutes (*b*), the assignee's right was not complete at law unless the debtor assented to the transfer; and, in the absence of such assent, an equitable title only passed to the assignee, and any action must have been brought in the original creditor's name: but by s. 25 (6) of that Act (*c*), any absolute assignment by writing signed by the assignor, of any "debt or other legal chose in action," with express notice in writing to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, is effectual at law to pass and transfer the legal right and all legal remedies (*d*).

Chattels real.

It is generally said that at the time when these earlier designations of the different kinds of property were introduced, and for long after, rights and interests in land chiefly attracted the consideration of the law (*e*). Even where land itself was leased

(*a*) For a like reason it was held that the benefit of a condition (see *ante*, p. 13) can only be reserved to the donor, feoffor, or lessor, and their heirs; and not to a stranger. See 2 Cruise, Dig., p. 4, § 15; p. 33, § 46. The reason given in the text is that given by Coke, *Lampet's Case*, 10 Rep. at 48 a. But it is suggested with great probability by Professor Maitland, in a most instructive article, 2 L. Q. R. 481, that the real reason is that as the creditor had not possession, he was unable to deliver possession, and therefore to transfer the ownership, which formerly could not be transferred without the possession.

(*b*) Bills of Exchange, promissory notes, bills of lading, life and sea policies of insurance; Wms. P. P., pp. 32, 33, 37. See as to assignments of policies of life assurance, 51 Vict. c. 8, s. 19, which makes the stamp essential to the validity of an assignment; repealed by the Stamp Act, 1891, 54 & 55 Vict. c. 39, re-enacted by s. 118.

(*c*) 36 & 37 Vict. c. 66. See *Read* v. *Brown*, 22 Q. B. D. 128.

(*d*) See more about choses in action in M. L. P. P., Ch. IX., pp. 134, *et seq.*; Elph. Introd. 183.

(*e*) The statement in the text has often been made, but it does not appear to be correct. Food and clothing are primary necessaries. In all archaic systems of law, we find that larceny, and in some cases distress, occupy an important place. Both these branches of law relate to personalty only. The late Sir H. Maine says:— "There must have been a time, when a wild animal tamed, which was a rarity, was of more value than a hundred acres of land, which was superabundant. The domain of a tribe, as soon as the history of mankind began, may have been jealously guarded by it as exclusive hunting ground, as marking the limits which none but a tribesman could step within, save for bloodshed or plunder, or may have been reserved by it (in a later stage of society) for pasture,

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Leases.

for a term of years, the interest of the lessee was treated as a chattel only, and was called a Chattel Real. The lease was considered, not as a conveyance of any estate in the land, but only as a contract for the enjoyment of the profits of the land (*f*); to use the language of the civil law, a lease for years conferred only a right *in personam* and not a right *in rem;* and the only remedy for the lessee, if ejected, was by writ of covenant against the lessor to recover the term, if in being, and damages, where the ouster was committed by the lessor himself, or, if the term had expired or the ouster had been committed by a stranger, then to recover damages only (*g*). A practice, however, grew up later of granting very long terms of years, sometimes of 100 years or even 1,000 years, for various conveyancing purposes (*h*). Yet, however long a term may be, it has always been considered to be a chattel only, and, like other personalty, on the death of the termor, or lessee, it vests in his personal representatives, and does not descend to his heir (*i*).

Property in Conveyancing Act, 1881.

From what has been said, the definition of property in the Conveyancing and Law of Property Act, 1881, will be understood. In that Act "property," unless a contrary intention appears, includes "real and personal property, and any estate

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but each man's share of this domain was of less value to him individually than a slave, a horse, an ox, or even than a flint-headed axe or spear. All this follows from the simplest economical axioms; but the vestiges of the older (and yet probably not the oldest) state of the primitive objects of enjoyment are plainly stamped upon one authentic record of archaic custom, the ancient Irish law; and they seem to me equally discernible in the ancient Teutonic code, the Lex Salica, which, whatever else it is, is pre-eminently a body of rules protecting the ownership of kine, swine, sheep, goats, horses, and even bees)." Early Law and Custom, 1891, p. 338.

(*f*) "A lease for years (see Bac. Abr., tit. *Leases*) is a contract between the lessor and the lessee for the possession and profits of land, &c., on the one side, and a recompense by rent or other consideration on the other." Butler's note to Co. Litt. 384 a. "Farm" is sometimes used in the sense of the thing demised, *Wrotesley* v. *Adams*, Plowd. at 194 a, sometimes in the sense of the rent reserved, *Browning* v. *Berton*, Plowd. at 132 a.

(*g*) 3 Bl. 156.

(*h*) In wills and settlements. For instance, see the form in a strict settlement in Stud. Prec., pp 88, 89, where a term is limited to secure portions.

(*i*) As to the history of chattel interests in land, see P. & M. Hist. ii. pp. 105, *et seq.*; Digby, R. P., pp. 49, 50, 174, *et seq.*, 239, *et seq.*, and Smith L. & T. (Lect. i.); 1 Cruise, Dig. Tit. 8, Ch. I., p. 222; Wms. R. P., pp. 18, 193; Bac. Abr., tit. *Leases*, Challis, R. P. 53. But that learned author's remarks as to seisin appear to require some re-consideration in view of recent investigations; see the articles by Prof. Maitland (L. Q. R., vols. i. and ii.). It may be noted that in Scottish law, a lease is heritable, not personal, property. *Bain* v. *Brand*, 1 App. Cas. 762.

or interest in any property, real or personal, and any debt, and anything in action, and any other right or interest "(*k*).

Descent or distribution of property.

The reader will have noticed one main distinction which exists in English law between real and personal property in reference to its ownership. Real property (in the absence of any effectual disposition made by the owner whether by his will or by some form of alienation *inter vivos*, *i.e.*, taking effect in his lifetime) descends at his death to his heir or real representative, who is ascertained by the rules hereafter explained (*l*). Personalty, on the other hand, in such case devolves on the person (called the administrator) who is appointed by the Court, for distribution (after payment of debts) among the next of kin.

Lex situs. *Lex domicilii.*

A leading distinction between movable and immovable property is, that, as to the latter, the rules of devolution on the death of the owner follow the *lex situs*, or *lex loci rei sitæ*, *i.e.*, the law of the place where the immovable property is situate; while, as to the former, they are ascertained by the law of the domicile of the owner, or, as it is said, *mobilia sequuntur personam*.

"It is a clear proposition not only of the law of England, but of every country in the world where law has the semblance of science, that personal property has no locality. The meaning of that is, not that personal property has no visible locality, but that it is subject to that law which governs the person of the owner. With respect to the disposition of it, with respect to the transmission of it, either by succession or the act of the party, it follows the law of the person. The owner in any country may dispose of his personal property. If he dies, it is not the law of the country in which the property is, but the law of the country of which he was a subject (*m*), that will regulate the succession. For instance, if a foreigner having property in the funds here, dies, that property is claimed according to the right of representation given by the law of his own country" (*n*).

In the above passage, however, the term "personal property" is not used with strict accuracy, for the propositions laid down are applicable, not to all "personal property" in the sense in which those words are used in English law, but only to so much of it as is included in the class of *mobilia*, a class which does not include chattels real, *i.e.*, leaseholds. This distinction, which has

(*k*) 44 & 45 Vict. c. 41, s. 2 (i.), and see the definition in the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 1 (4) (i.).

(*l*) See Ch. V., *post*.

(*m*) *Sic*, but there is a manifest error in the report; the sentence should run, "the law of the country in which he was domiciled."

(*n*) *Sill* v. *Worswick*, 1 H. Bl. 690. See Westlake's Private International Law, Ch. V. This principle is recognized in the Indian Succession Act.

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important consequences in English law, seems not to have been clearly apprehended until recently; at all events, the language of text-writers and even of learned Judges is often such as is likely to mislead, unless the reader bears in mind the fact that the class "immovables" is not co-terminous with "real property," nor the class "movables" with "personal property."

"Immoveables," says a learned writer, "are tangible things which cannot be moved, such as are lands and houses, whatever be the interest or estate which a person has in them. Hence the term includes what English lawyers call 'chattels real,' that is to say, land, &c., in which a person has less than a freehold interest, as, for instance, leaseholds"(*o*). He goes on (*p*) to observe that "Law is always concerned in truth not with things but with rights, and therefore not directly with immoveables or moveables, but with rights over or in reference to immoveables or moveables, or, to use popular language, with immoveable property and moveable property. It will serve to make clear the relation between the division into immoveables and moveables and the division into realty and personalty, if we treat each as a division, not of the subject of property, but of the rights of which property, from a legal point of view, consists. Immoveable property includes all rights over things which cannot be moved, whatever be the nature of such rights or interests. Moveable property includes both rights over moveable things, or goods, and rights which are not rights over a definite thing, but are claims by one person against another (*e.g.*, the claim by A. to be paid a debt due to him by X., or generally to the performance of a contract made with him by X.), or, in other words, which are *choses in action*. Realty, looked at as a division of rights, includes all rights over things which cannot be moved, except chattels real. Personalty, looked at as a division of rights, includes both rights over moveables and choses in action, and further includes chattels real, or leaseholds. Hence immoveable property is equivalent to realty with the addition of chattels real; moveable property is equivalent to personalty with the omission of chattels real"(*q*).

(*o*) Dicey, p. 71.

(*p*) *Ib.*, p. 72 (iii.).

(*q*) Mr. Dicey proceeds to notice the occasional identification of "moveables" with "personal property" in the earlier cases, referring to the judgment of Lord Loughborough in *Sill* v. *Worswick*, [1791] 1 H. Bl. 665—690, and Abbott, C.J., in *Doe* d. *Birtwhistle* v. *Vardill*, [1826] 5 B. & C. 438, 451, 452, and *Forbes* v. *Stevens*,

It is not within the scope of the present work to deal in any detail with the earlier history of the English law relating to real estate. It is assumed here that the reader has obtained some knowledge of the subject from other sources (*r*); but it may be useful in this place to remind him of the meaning of some of the more important terms which constantly occur in the following pages, and which must be clearly understood in order that the existing rules of law relating to real property may be intelligible.

Tenure.

At the root of the English law of land lies the conception of Tenure; that is to say, the theory of our law is that a subject cannot be the absolute owner of land, but only a "tenant," or holder of it for an "estate," *i.e.*, an interest giving him and his successors in title a right to the occupation and enjoyment of it, or its rents and profits, for a period which is indefinite or uncertain as to its duration (*s*), but is not perpetual; and upon the determination of which the land reverts to the person of whom it is held, who is called the lord. The ordinary estates are an estate for life and estates of inheritance, viz., an estate in fee simple, which is where lands are granted to a person and his heirs, and an estate tail, where they are granted to him and the heirs of his body. All land is considered to be vested in the Crown, and to have been granted by the Crown to its subjects by

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[1870] L. R. 10 Eq. 178, and says "This doctrine" (that leaseholds are, as regards the conflict of laws, governed by the rules which apply to movables properly so called) "has now been pronounced erroneous, and leaseholds, it has been decided, are, as regards the conflict of laws, to be considered, of course, as personalty, but also as immoveables." The distinction has been clearly drawn in *Freke* v. *Lord Carbery*, L. R. 16 Eq. 461, where it was held that the testamentary disposition of an English leasehold is governed by the law of England; and in *Duncan* v. *Lawson*, 41 Ch. D. 394, where it was held that leaseholds in England, belonging to a domiciled foreigner (*e.g.*, a Scotchman), devolve, in case of his intestacy, upon the persons entitled according to the English Statute of Distributions. See also *Hood* v. *Lord Barrington*, L. R. 6 Eq. 218; and Dicey (Rule 138), p. 516, *et seq.*, and the other cases referred to Dicey, p. 73, note 2. On the other hand, slaves on a West India plantation, who were certainly in the nature of movables, were held to be devisable as real estate; *Richards* v. *A.-G. of Jamaica*, 6 Moo. P. C. 381; S. C., 13 Jur. 197; see *Ex p. Rucker*, 3 Dea. & Ch. 704; *Stewart* v. *Garnett*, 3 Sim. 398. But they were impressed with the character of personalty from the passing of the Slavery Abolition Act, 3 & 4 Will. IV. c. 73; *Richards* v. *Att.-Gen. of Jamaica*, 6 Moo. P. C. 381.

(*r*) *E.g.*, Digby, R. P.; P. & M. Hist.

(*s*) We here exclude leases for years, which were not regarded by the ancient common law as estates: see *post*, p. 159. As to what is meant by an "estate," see *post*, p. 30, note (*b*), and see Digby, R. P. 60, 61.

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the process known as infeudation, to hold for various estates, *i.e.*, to use and enjoy during the subsistence of those estates (*t*).

A subject to whom land was thus granted in fee simple might by sub-infeudation grant part of his holding to another person to hold of himself in fee simple until such sub-infeudation was prohibited by the Statute of *Quia Emptores* (18 Edw. I. c. 1, A.D. 1290). In such cases the Crown was lord paramount, and its immediate tenant (who was called tenant *in capite*) was lord (called *mesne* lord) as regards the tenant holding by sub-infeudation (*u*), who is sometimes called "tenant paravail." This process of sub-infeudation might be repeated indefinitely; and the ultimate tenant who actually had possession of the land for an estate of freehold (that is, who had not any freehold sub-tenant under him, though the land might be subject to a lease for years) was called the "terre-tenant" (*x*), or sometimes "the tenant," simply, and was said to hold the land "in demesne" (*y*). The relation between lord and tenant involved certain obligations on both parties. The obligations of the tenant are generally called "services."

The ordinary tenure of land in England is known as freehold; and all land is presumed to be of freehold tenure until the contrary is proved (*z*). It is the Common law tenure, as distinguished from local tenures, which depend upon the customs of particular places, and of which the most important is that which is known as copyhold, and is hereafter treated of in some detail (*a*).

Estates of freehold might be either for life only, or of inheritance, *i.e.*, descendible to the heirs of the tenant; but the

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(*t*) Co. Litt. 1 a, 65 a, 98 a; *ib.* 191 a, and Butler's note. *A.-G. of Ontario* v. *Mercer*, 8 App. Cas. 767, *per* Lord Selborne, C. The 1st and 2nd Editions of this work contained in Part II. of the Introduction some remarks on Tenure and the Feudal System which have been omitted in the present Edition for reasons stated in the Preface to the 3rd Edition. On the subject of Tenure the reader is referred to P. & M. Hist., vol. i., pp. 207, *et seq.*: Digby, R. P., Part I., Ch. I., s. 2; Challis, R. P., Part I., "On Tenure;" Leake on Property in Land, Part I., Ch. I., s. 1; the "Preliminary Dissertation on Tenures" at the commencement of Cruise's Digest; and Butler's note, Co. Litt. 191 a.

(*u*) Land is presumed to be held *in capite*; *Doe* v. *Redfern*, 12 East, 96.

(*x*) "Terre-tenant" appears properly to mean the freeholder as distinguished from the tenant for years. *Re Herbage Rents*, [1896] 2 Ch. 811. But see to the contrary, Cowell Interp. s. v.

(*y*) See Elph. N. & C. Interp., p. 570, s. v. *Demesne*.

(*z*) Challis, R. P. 3.

(*a*) *Post*, Ch. XIII.

ancient Common law did not recognize any estate less than a life estate (*b*).

Seisin.

The ancient mode of creating or transferring an estate of freehold was by putting the tenant in possession of the land by the process known as "livery of seisin." The term "seisin" has in comparatively modern times been restricted to the possession of land for a freehold estate; but originally it was synonymous with possession, whether of land or personal chattels (*c*). The process of conveyance or investiture by means of livery of seisin is called a feoffment; and the estate which the feoffee (or person to whom livery of seisin was made) was to take was generally, though not necessarily, evidenced by a deed, or "charter," of feoffment, which marked out or limited that estate.

The system of tenure required that there should always be a tenant of the freehold in possession to render the services to the lord. If there were no such tenant, so that the possession was vacant, it was said that the seisin, *i.e.*, the immediate freehold, was in abeyance (*d*). Many of the rules of law with regard to the validity of limitations of estates to different persons in succession depend upon this elementary doctrine (*e*).

Present and future estates.

Where the tenant in immediate possession has a limited estate, as for life, the persons entitled to possession after the expiration of his estate, have future estates. The only future estates known to the ancient Common law were either remainders or reversions (*f*).

Legal and equitable estates.

Rights and duties in respect of freehold estates were enforced by the Courts of Common law, which recognized only the tenant who could prove a title created in the manner prescribed by the Common law. When the practice arose of making a feoffment to one person to hold "to the use" of, or "in trust for," another, the Common law refused to recognize the latter as having any legal rights. It regarded only the Common law or "legal" estate. The *cestui que use*, or person for whose use the legal

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(*b*) The term "freehold" is sometimes used to mean a life estate as opposed to an estate of inheritance; Coke, Cop. s. 15 (cited in 1 Cruise, Dig. 48, s. 15). See Butler's note (1) to Co. Litt. 266 b.

(*c*) See 1 L. Q. R. 324; 2 *ib.* 481; P. & M. Hist. ii. 29, *et seq.*; and *post*, p. 153, note (*u*).

(*d*) Co. Litt. 342 b.

(*e*) See Hargrave's Law Tracts, 498, 567.

(*f*) See the difference between them explained, *post*, Ch. VIII., p. 234.

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tenant was seised, obtained the recognition of his rights from the jurisdiction of the Court of Chancery which administered equity; and thus arose equitable estates or interests as distinguished from legal estates (*g*). The right of the beneficial owner in equity was at first regarded as a personal right, originating in a contract which the Court of Chancery compelled the legal tenant to perform (*h*). It will be noticed that the Common law doctrines as to abeyance of the seisin were inapplicable to the equitable use or beneficial ownership; and it followed that estates or interests might be created by way of use (*i.e.*, as equitable estates), which would not have been allowed by the Common law to be good, *i.e.*, which could not be created as legal estates.

The operation of the Statute of Uses (27 Hen. VIII. c. 10), as hereafter explained (*i*), was to turn, in certain cases, uses or equitable interests into legal estates, and thus to enable the creation of legal estates which could not have been created by the Common law method of conveyance. That method involved an actual livery of the seisin, and was therefore from its nature restricted in its operation: but the Statute operated independently of livery of seisin.

Trees.

There are some few subjects of property of such a nature that they may be either real or personal property according to circumstances. Thus, timber trees (*k*) while growing in the ground are considered to partake of the nature of the soil itself, and are then part of the realty. This is a consequence of the principle already explained, that whatever is attached to the soil acquires the character of the soil itself, as though it were part of it. If such trees are cut or blown down, and thus severed from the land, or are severed from the land by a person who has no right to sever them, they become personal property; having been part of the inheritance, they belong to the owner of the inheritance (*l*); and, where there are successive estates of inheritance, to the

(*g*) See Wms. R. P., Ch. VII.; Elph. Introd. 5.

(*h*) "In old times a use was a *chose in action*;" Holmes, The Common Law, p. 407; and therefore it was held that a trust could not be assigned, "because it was a matter in privity between them" (*i.e.*, the feoffee or trustee and the *cestui que use* or *cestui que trust*), "and was in the nature of a *chose in action*;" Coke, 4th Inst. 85; Dyer, 369, pl. 50; Jenk. Cent. 6, c. 30; Gilbert on Uses, 198 (Sugd. ed. 399).

(*i*) *Post*, Ch. X.; Elph. Introd., Ch. I.

(*k*) As to trees which are not timber, see *Honywood* v. *Honywood*, L. R. 18 Eq. 306, cited *post*, p. 42.

(*l*) See Leake, Us. & Prof. 39; 1 Cruise, Dig. 126, 127; *In re Ainslie*, 30 Ch. Div. 485.

owner of the first of such estates, whether he be tenant in fee simple or in tail: and whether his estate is in possession or is subject to a prior life estate: subject to this, that, if there is a tenant for life in possession who is not impeachable for waste (*post*, p. 46), the severed trees belong to him (*m*).

Emblements.

Growing crops or "emblements" (*fructus industriales*), unlike growing trees and other permanent growths, devolve on the personal representative and not on the heir of a deceased owner of the inheritance who dies before they are reaped; the reason being that annual crops are mainly the result of the expenditure of the owner's personal estate. But, though the personal representative is entitled to them as against the heir; a devisee of the land is entitled to them as against the personal representative, unless it appears from the will that the testator intended some one else to take them (*n*).

In favour of agriculture, it has been established that, where a tenant has a limited interest in land, for a term, not fixed, but of uncertain duration, *e.g.*, for his own life, or during the life of another, he is or his personal representatives are entitled to the crops sown during his tenancy and reaped after its cesser or determination, unless the tenancy is determined by his own act, as by surrender or forfeiture (*o*).

The principle, according to Lord Denman, C.J. (*p*), is that the tenant should be encouraged to cultivate, by being sure of receiving the fruits of his labour. The tenant is entitled to such products only as grow by the industry and manurance (*q*) of man, and to one crop only of those products; and the crop must be of a species which ordinarily repays the labour by

(*m*) See *In re Barrington*, 33 Ch. Div. 523, 527; whence it appears that the law as to minerals is similar.

(*n*) *Cooper* v. *Woolfitt*, 2 H. & N. 126. "For the devisee is not *hæres factus*, but takes by conveyance. He is therefore entitled to everything which is appurtenant to the land." (*Per* Pollock, C.B.) He is a "purchaser" in law; see *post*, p. 144.

(*o*) "And this is not only proper to a lessee at will . . . but to every particular tenant that hath an estate incertain," Co. Litt. 55 b. See 1 Cruise, Dig. 105, 106. "But," says Littleton, s. 68 (Co. Litt. 55 a), "otherwise it is if tenant for years, which knoweth the end of his term, doth sow the land, and his term endeth before the corn is ripe." But by local custom or by express contract tenants for years may be entitled to similar rights under the name of "away-going crops;" see *Wigglesworth* v. *Dallison*, Dougl. 201, and notes to that case in 1 Smith L. C.; Smith L. & T., Lect. ix., p. 393 (3rd ed.), as to emblements and way-going crops; see more about emblements 3 Byth. & Jarm. Rob., 322, *et seq.*

Away-going crops.

(*p*) *Graves* v. *Weld*, 5 B. & Ad. 117.

(*q*) As to the meaning of this word, see Elph. N. & C. Interp. 571, note (*b*), and *post*, p. 159, note (*i*).

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which it is produced within the year in which that labour is bestowed.

Mr. Leake (*r*) says:—

"The term '*emblements*' is used to designate the growing crops cultivated by the labour and at the cost of the tenant in possession, which are treated in law for many purposes as moveable chattels, and as the personal property of the tenant, because his intention in cultivating them is to increase his personal estate rather than to benefit the heir or successor to the land. The class of things thus designated includes the annual crops of corn and grain, hemp and flax, hops (*s*), potatoes, turnips and the like, clover and artificial grasses; but not growing grass, which is the natural and permanent produce of the land renewed from time to time without cultivation (*t*). It does not include timber or other trees, whether mature or immature; nor does it include the growing fruit of trees, as growing crops of apples and pears (*u*). The term, as used in law, conveys only the present annual crop, and not the future crops of cultivated products which bear annual crops for several successive years, as of clover and artificial grasses" (*x*).

Where the lease ceases by the death or cesser of the estate of any landlord entitled for his life, or for any other uncertain interest, the Landlord and Tenant Act, 1851 (*y*), recompenses the tenant at rack-rent, not by the emblements, but by allowing him to hold until the expiration of the current year of his tenancy.

Trees when severed from the ground, and the fruit and produce of them when severed from the body of the tree, and emblements, are sometimes called "chattels vegetable" (*z*).

Fixtures.

By the ancient rule of the Common law, expressed in the maxim *Quicquid plantatur solo, solo cedit*, whatever is planted or built in the soil or freehold becomes, in point of law, part of the freehold or inheritance. Thus, as we have seen, a house becomes part of the land on which it stands. In like manner anything annexed or affixed to any building (and not merely laid upon or brought into contact with the building) was, by the old Common law rule, treated as an addition to the property of the owner of the inheritance in the soil, and was termed a "fixture." Where fixtures are annexed by a tenant in fee simple, he can, by virtue

(*r*) Us. & Prof., p. 44. And see Foa, L. & T., p. 557.

(*s*) *Latham* v. *Atwood*, Cro. Car. 515.

(*t*) Co. Litt. 55 b; Wms. Exors. 625; *Evans* v. *Roberts*, 5 B. & C. 832.

(*u*) *Ib.*; and see *Rodwell* v. *Phillips*, 9 M. & W. 505.

(*x*) *Graves* v. *Weld*, 5 B. & Ad. 119.

(*y*) 14 & 15 Vict. c. 25, s. 1. See *Haines* v. *Welch*, L. R. 4 C. P. 91; and 53 & 54 Vict. c. 57.

(*z*) 1 Wms. Exors., Pt. II., Bk. II., Ch. II., s. 2.

of his ownership, disannex and dispose of them as he pleases, and on his death the rule obtains in favour of the inheritance, that is, of the heir or devisee, as against the personal representatives and legatees, so that the latter have no right to disannex fixtures and treat them as personal chattels (*a*).

But, by another general rule of the Common law, "whatever once becomes part of the inheritance cannot be severed by a limited owner, whether he be owner for life or for years, without committing that which in the law of England (*post*, p. 41) is called waste" (*b*). This second rule, however, namely, the irremovability of things fixed to the inheritance, has, upon motives of public policy, to encourage improvements (*c*), and to encourage trade (*d*), been greatly relaxed in favour of a lessee as against the lessor, and, to a less extent, in favour of the personal representatives of a tenant for life or in tail, as against the remainderman, or person next entitled to the land. It has been remarked (*e*) that "in considering any question of fixtures, the important questions to be regarded are, first, the mode of annexation of the article and the extent to which it is united with the freehold; secondly, its nature and construction, as whether it has been put up for a temporary purpose, or by way of permanent improvement; and, thirdly, the effects its removal will have upon the freehold." A lessee for a term of years may now remove articles set up by him for the purpose of trade, or for the purpose of ornament or domestic convenience, as marble chimney-pieces, pier-glasses, hangings, wainscot fixed only by screws, and the like (*f*), provided (in the absence of express power given to enter and remove after the expiration of the lease) they are removed during the term (*g*); and the same articles may be removed by the tenant for life or by his personal representatives, if annexed by himself; but, if annexed by the owner of an estate of inheritance, they will pass with the house to the devisee or heir.

(*a*) *Per* Lord Ellenborough, C.J., in *Elwes* v. *Mawe*, 3 East, 51; 2 Sm. L. C. See *Norton* v. *Dashwood*, [1896] 2 Ch. 497, where tapestry was held to pass with a house to the devisee.

(*b*) See *per* Ld. Cairns, C., in *Bain* v. *Brand*, 1 App. Cas. 762.

(*c*) *Per* Ld. Hardwicke, *Lawton* v. *Lawton*, 3 Atk. 15.

(*d*) *Elwes* v. *Mawe*, 2 Sm. L. C.; *per* Ld. Ellenborough.

(*e*) *Per* Chitty, J., *Norton* v. *Dashwood*, [1896] 2 Ch. 497. See also *Hobson* v. *Gorringe*, [1897] 1 Ch. 182.

(*f*) *Elwes* v. *Mawe*, 2 Sm. L. C.

(*g*) *Pugh* v. *Arton*, L. R. 8 Eq. 626. See as to fixtures where the lessee i bankrupt, Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 55, § 3; *In re Moser*, 13 Q. B. D. 738.

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There is a stricter limitation of the tenant's right to remove what are styled ornamental fixtures than to his right to remove trade fixtures. The general rule as to the former seems to be, that they must not be removed if permanent injury to the building would be caused by the removal; but as to trade fixtures, the right to remove them is generally restricted only by the rule, that the principal thing "shall not be destroyed by the accessory" (*h*). The question often arises in cases of distress for rent by a landlord, the rule being that he cannot distrain fixtures annexed to the freehold (*i*); and so it has been held that railways by their annexation to the soil become fixtures, and are not distrainable (*k*). It has been said by a learned writer that "the doctrine of fixtures rests on a series of judicial decisions in contravention of an ancient rule in favour of the freehold," and the word "fixtures" has come to be used in a sense directly the reverse of its natural and original signification. In 1834, Parke, B. (*l*) said:—

"The term 'fixtures' has now acquired the peculiar meaning of personal chattels which have been annexed to the freehold, but which are removable at the will of the person who has annexed them."

Agricultural fixtures.

As regards buildings and fixtures erected or annexed for purposes of agriculture, as distinguished from trade, the rule of Common law generally applies (*m*). But the rule has been relaxed by various statutes. Thus the Landlord and Tenant Act, 1851 (14 & 15 Vict. c. 25), s. 3, made buildings, engines, or machinery, erected (either for agricultural purposes or for the

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(*h*) As to trade fixtures, see *Lawton* v. *Lawton*, 3 Atk. 13; *Elwes* v. *Maw*, 3 East, 38; where the early cases are cited. In *Lawton* v. *Lawton* a fire-engine set up for the benefit of a colliery by a tenant for life was held to be part of his personal estate. The right given to the tenant to remove trade fixtures by the general law may be extended by local usage or the custom of a particular trade, *Trappes* v. *Harter*, 3 Tyr. 603; *Darss* v. *Jones*, 2 B. & Ald. 165. As to ornamental fixtures, see *Buckland* v. *Butterfield*, 2 Brod. & B. 54, where a conservatory erected by a tenant for years and attached to the dwelling-house was held to have become part of the land, and not removable. See generally as to fixtures, Smith, L. & T., Lect. ix., pp. 420, *et seq.*; Foa, L. & T. 539, *et seq.*

(*i*) See *Simpson* v. *Hartopp* in 1 Sm. L. C., and notes thereto; Smith, L. & T. 213.

(*k*) *Turner* v. *Cameron*, L. R. 5 Q. B. 306; and see *Dunerque* v. *Rumsey*, 2 H. & C. 777, where a tenant holding under a lease had renounced the ordinary right of a tenant to disannex fixtures during the term, and therefore they could not be taken in execution by the sheriff.

(*l*) *Hallen* v. *Runder*, 1 C. M. & R. 276.

(*m*) *Elwes* v. *Maw*, 2 Sm. L. C. The subject of Fixtures is treated at length in Wms. Exors., vol. i., Pt. II., Bk. II., c. 2, s. 3.

purposes of trade and agriculture) by the tenant with the consent in writing of the landlord, removable by the tenant, unless the landlord after notice should elect to purchase them. The Agricultural Holdings Act, 1875 (*n*), contained similar provisions, and did not require the fixtures to have been erected with the consent of the landlord. This Act is now replaced by the Agricultural Holdings Act, 1883, the provisions of which apply to engines, machinery, fencing or other fixtures, and buildings (*o*).

Animals.

The subject of property in animals may here be briefly referred to (*p*). Animals have been classified into such as are tame or domesticated, and such as are wild or usually found at liberty—*domitæ naturæ* and *feræ naturæ* respectively. Among the former are horses, kine, sheep, poultry, and the like, also "hounds, greyhounds, spaniels "(*q*), and the like; in these, as chattels, a man may have an absolute property. But the word "property" when applied to wild animals (including game), while they continue in their wild state, means no more than the exclusive right to catch, kill and appropriate such animals; which is called by the law a reduction of them into possession (*r*). This right is really an incident of the possession of the land on which the wild animals are found, but it is sometimes called a qualified or special right of property. But if a man reclaim them, and confine them within his immediate power, they may be his personal property, and pass to his executors on his death (*s*).

Title-deeds.

The title-deeds of land are regarded as accessory to the land, and therefore pass with the land itself on its devolution from an ancestor to an heir, or from a testator to the devisee (*t*): but if land is mortgaged by a deposit of the deeds as a security for the

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(*n*) 38 & 39 Vict. c. 92, s. 53: repealed for future purposes by the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 62.

(*o*) S. 34; applied to market gardens by the Market Gardeners Compensation Act, 1895 (58 & 59 Vict. c. 27), s. 3 (1).

(*p*) See M. L. P. P., p. 3; Leake, Us. & Prof., Ch. VI., p. 73.

(*q*) Wentworth on Exors., p. 143.

(*r*) *Per* Ld. Westbury, C., *Blades* v. *Higgs*, 11 H. L. 621.

(*s*) 1 Wms. Exors. 618; Wentworth on Exors. 143. See Wms. P. P., pp. 46, 133. See the leading case as to deer being reclaimable, *Morgan* v. *Earl of Abergavenny*, 8 C. B. 768. See also a curious case, *Hannam* v. *Mockett*, 2 B.& C. 934, in which it was held an action could not be maintained against a man for disturbing and driving away rooks, on the ground that the plaintiff could not have any property in them or shew any right to have them resort to his trees. The plaintiff had been in the habit of making profit by killing and taking the rooks and their young.

(*t*) See 1 Cruise, Dig., p. 46 (6); Leake, Us. & Prof., p. 124; Wms. P. P., pp. 122—125, and *ante*, p. 11.

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loan, they are considered personalty in the hands of the mortgagee, whose special property in them passes on his decease to his personal representative (*u*).

Land employed in trade.

The same property may at the same time be real for one purpose and personal for another. Land is often used for the purposes of trade, or the carrying on of public undertakings. For example, persons engaging in a commercial partnership for the manufacture of sugar or of silks would require a factory for the purpose. Now supposing they acquire such a factory for an estate of inheritance in fee simple, the factory, though in its nature realty, will, as between the partners and their representatives (assuming it to be part of the common stock or capital of the partnership), be treated as personalty, and on the death of a partner his beneficial interest in the factory devolves not on his heir but on his personal representatives (*x*).

Again, the land on which a railway is constructed forms part of the general capital of the company. The shareholders subscribe their money in the expectation of getting dividends out of the profits of the traffic, the working of the undertaking; and their shares in the whole concern are in the nature of personal and not real property. Thus, though the land occupied by the railway is in itself realty, and is liable to be rated as land (*y*), yet the undertaking itself and the profits of its

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(*u*) Shep. T. 469.

(*x*) "The share of each of the partners is not a share in any specific asset or any specific part of the assets real or personal, but is his share of what will ultimately come to him when the accounts are ascertained, and when the assets are got in, the debts paid, and the amounts realized. But then, although there be the right of each partner in so much capital stock, which is personalty, and I should say in one sense is pure personalty, because it is personalty as between the real and personal estate, still it is exactly that which comes within the very words of the Statute" (of Mortmain, as an interest in land). "Whatever is the amount coming due to that partner, that partner has an immediate and direct charge or incumbrance on the land for that very sum, and his right is to have the land sold for the purpose of realizing that charge or incumbrance which he has upon it;" *per* James, L.J., *Ashworth* v. *Munn*, 15 Ch. D. 369. See further, as to the nature of a partner's interest in lands, Lindley on Partn. 352; and consider the distinction (*ib.* p. 353) as to cases in which persons, though partners in profits, are only co-owners of the lands which yield them; *i.e.*, where the lands are not in fact partnership assets at all, although used for partnership purposes, as, for instance, in *Davis* v. *Davis*, [1894] 1 Ch. 393 (where the cases are reviewed at pp. 401, *et seq*). See further, as to partnership and co-ownership, M. L. P. P., p. 11.

(*y*) *N. E. Ry. Co.* v. *Local Board of Leadgate*, L. R. 5 Q. B. 157; *Queen* v. *Midland Ry. Co.*, L. R. 10 Q. B. 389; *Queen* v. *London & North-Western Ry. Co.*, L. R. 9 Q. B. 134.

working are personalty. It was in 1886 decided in a case relating to shares in the Chelsea Waterworks Co., that the shares were personal property, and that real property held for the purposes of a trading company was in equity to be deemed personal estate (*z*).

(*z*) *Bligh* v. *Brent*, 2 Y. & C. 268. In the judgment of Alderson, B., the distinction is pointed out between the Chelsea Waterworks Co. and the New River and Avon Navigation Cos., in which the shares were held to be real property. Now canal and railway shares are made personal property by the Acts of Parliament under which the companies are incorporated; and, by the express provision of the Companies Act, 1862 (s. 22), shares in companies constituted under that Act are declared to be personal estate.

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CHAPTER II.

OF ESTATES GENERALLY; ESTATES FOR LIFE.

I. Estate—what.

We now proceed to consider the various interests or modes of ownership which may exist in respect of Real property.

By the term "interest"(*a*) is here meant that amount of ownership which the law recognizes as conferring, what is technically termed, an "estate" in its subject-matter (*b*).

No estate in personalty.

Property, as we have seen, is divided by our law into real and personal; but, if we except the particular species of personalty called a chattel real, the term "estate" is properly used as applic-

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(*a*) As to the more common meaning of "interest," see Co. Litt. 345 b; Elph. N. & C. Interp. 205.

(*b*) See P. & M. Hist. ii. 10; Wms. R. P. 7. As to the difference between estates "in possession," in "reversion," and in "remainder," see *post*, Ch. VIII., p. 227. The English legal conception of a succession of "estates" in land is discussed by Sir W. Markby (Elements of Law, 5th ed., p. 165), who contrasts it with the "substitutions" of other systems of law, as to which see Pothier, *Traité des Substitutions*, and 2 Burge Comm. 89, *et seq.* See also the remarks in 1 Cruise, Dig., Ch. I., § 68, as to the difference between the descent of an estate to the heir in feudal law and the succession of the *heres* in the civil law. The theory of substitution seems to be that each successive owner, whatever be the period for which he is entitled to the enjoyment, is, for that period, invested with the entire ownership: that is, that each successive owner is owner of the same thing, but that no owner has any property or right in the thing until the event happens upon which he becomes entitled to the present enjoyment of it. The English law, on the other hand, regards all the persons to whom estates are limited in succession as having existing rights in the thing, though their enjoyment may be postponed to prior interests and may be contingent.

Sir W. Markby (*loc. cit.*) notes that in English law there is a "substitution" when a man who inherits an estate is compelled to give up one which he previously held, so as to provide for another member of the family; and see the remarks of Mr. Digby (R. P. 161) as to Bracton's view of the nature of what would now be called a remainder in tail.

"*Estate* signifieth such inheritance, freehold, term for years, tenancy by statute merchant, staple, *elegit*, or the like, as any man hath in lands or tenements;" Co. Litt. 345 a. See the division of estates in *Edward Seymor's Case*, 10 Rep. at 97 b.

In *Walsingham's Case*, Plowd. 555, it is said (apparently *arguendo*):—"The land itself is one thing, and the estate in the land is another thing; for an estate in the land is a time in the land, or land for a time; and there are diversities of estates, which are no more than diversities of time; for he who has a fee simple in land has a time in land without end, or land for time

able only to real and not to personal property. Personal property is essentially the subject of absolute ownership, and is not held for any "estate"(*c*). It is, strictly speaking, not legally possible to give chattels (including chattels real or leaseholds) to one for life and after his death to another or others. There can be no remainder or reversion in the legal interest in a chattel. If a chattel real be given by will to A. for life, and after his death to B., the legal view is that the whole term is vested in A. during his life, and on his death it shifts to and vests in B., who during A.'s life has only a "possibility" or expectancy of obtaining the term. Such a gift is called an executory bequest. But successive equitable interests may be created in personal property by means of a settlement of it: for which purpose the proper course is to transfer it to trustees, and by a declaration of trust to define the mode of beneficial enjoyment. Thus, in order to create a succession of equitable interests in stock in the Public Funds, in such a way as to settle it, on the occasion of a marriage, for example, on parents for life, and after their death on their children, the course is to transfer the stock into the names of trustees in the Bank-books, and then declare the persons for whom the trustees are to hold it and the interests which those persons are to take in it. The effect is that the actual enjoyment of the property is secured to the parents and the children, but the whole legal ownership of the stock and the power of transferring the legal ownership are vested in the trustees alone.

Quantity of—duration. Quality of—mode of enjoyment.

Estates in real property may be considered, first, with reference to the time of their continuance, and, secondly, with reference to the mode of their enjoyment, and their nature, incidents, and other qualifications, such as their being in possession, or in reversion or remainder, absolute or conditional (*d*). The former may be termed the Quantity of the estate, the latter its Quality. As regards continuance, or duration, the estate

without end; and he who has land in tail has a time in the land, or the land for time, as long as he has issue of his body; and he who has an estate in land for life has no time in it longer than for his own life; and so of him who has an estate in land for the life of another, or for years."

Bacon (Tracts, p. 337) says: "All estates are but times of their continuances. There are two substantial and essential differences of estates, the one limiting the times, and the other maketh difference of possession, as remainder; all other differences of estates are but accidents."

(For the references to Plowden and Bacon we are indebted to Mr. Leake, Law of Prop. in Land; Introd., p. 4.)

(*c*) See M. L. P. P., p. 8.

(*d*) 6 Cruise, Dig. 475, note, citing Preston on Estates, 7.

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may be one which is to subsist only for a given period, which may be either of uncertain or of certain duration; (for examples, the life of an individual, or a fixed term of years); or it may continue, by transmission or devolution, from the original holder to his heirs or successors in title so long as such heirs or successors exist. As regards mode of enjoyment, the whole estate may be vested in one person, *i.e.*, as the law terms it, be held "in severalty"; or it may be vested in several persons "jointly" or "in common," or "in coparcenary."

Estates in freeholds.

We will first consider the nature of the various estates in lands of free tenure or freehold (*e*), and then leaseholds or chattels real, or, as they are sometimes called, estates "less than freehold."

An estate of freehold is an estate in lands of free tenure, as distinguished from lands of copyhold or customary tenure, and is held for an uncertain period, as distinguished from a fixed term of years. It is an estate which, if in possession, could not formerly be created or conveyed without livery of seisin (*f*). In order to create an estate of freehold three things are necessary and sufficient:—

(1) The subject-matter must be land or some interest derived out of or annexed to land. It is impossible that any interest in personalty should be freehold.

(2) That land must be of free tenure.

(3) The period for which the estate is held must be uncertain. It may be thought that a limitation to A. for a term of years if he shall so long live is freehold on account of the possibility that he will die within the term; but this is not the case, as the utmost duration of the estate is the term, which is fixed (*g*).

A copyholder is sometimes spoken of as having a freehold interest in his land. Though this phraseology is not strictly speaking correct, it will not lead the student into error, if he remembers that all that is meant is that he has an interest in

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(*e*) "Tenant in fee, tenant in tail, and tenant for life, are said to have *frank tenement*, a freehold; so called because it doth distinguish it from terms of years, chattels upon uncertain interests, lands in villenage, or customary or copyhold lands. . . . And note that tenants by statute merchant, statute staple, or *elegit*, are said to hold land *ut liberum tenementum* until their debt be paid; and yet in troth they have no freehold but a chattel which shall go to the executors;" Co. Litt. 43 b. See also Challis, R. P., pp. 7, 8; Digby, R. P. 160.

(*f*) Co. Litt. 48 a.

(*g*) Co. Cop. s. 15; Cruise, Dig., vol. i., p. 47, s. 12.

the land which would amount to an estate of freehold if the land had been of free tenure.

A freehold estate may be for life only, or be of inheritance, that is, in tail or in fee.

II. Estate for life (*h*).

As to an estate for life. This is an estate held, or capable of being held, during the subsistence of a life or lives. We say "or capable of being held," because an estate which, though subject to a possibility of earlier determination, has a capability of enduring for life, is measured by the latter quality rather than the former, and is treated as an estate for life. Thus, the dower estate of a widow was said to be an estate for life, even when it was (as it still is, in gavelkind) for widowhood only, and determinable accordingly on a second marriage (*i*). And so it is "if a man grant an estate to a woman *dum sola fuit*, or *durante viduitate*, or *quamdiu se bene gesserit*, or to a man and a woman during the coverture, or as long as the grantee dwell in such a house, . . . or for any like incertain time, . . . in all these cases the lessee hath an estate for life determinable" (*k*).

"Natural life."

Formerly an estate granted to a man for his life determined in his lifetime if he entered into a monastery and became "professed in religion, and so 'dead in law'"(*l*). Hence in the creation of such estates it was usual at one time (*m*) to limit the interest to the grantee for his "natural life."

Estate pur autre vie.

The life for which the estate is held may be either that of the person to whom the grant is made, or it may be the life of some other person, or even the lives of several persons. For example, the limitation may be to A. for his life, or to A. for the life of B., or for the lives of B., C., and D. In either of the latter cases, the person or persons, on whose life or lives the existence of the estate is dependent, is or are called the *cestui que vie* or *cestuis que vie*.

(*h*) Co. Litt. 41 b; Challis, R. P. 311.

(*i*) "It is curious to observe the several revolutions which the doctrine of dower has undergone, since its introduction into England. It seems first to have been of the nature of the dower in gavelkind; viz., a moiety of the husband's lands, but forfeitable by incontinency or a second marriage. By the famous charter of Henry 1. this condition of widowhood and chastity was only required in case the husband left any issue, and afterwards we hear no more of it." 2 Bl. 133. See P. & M. Hist. ii. 418, *et seq.*

(*k*) Co. Litt. 42 a; Shep. T. 107.

(*l*) Co. Litt. 132 a. See, as to "civil death," P. & M. Hist. i. 416. Foreign profession was never a cause of forfeiture: 2 Roll. Ab. 43; *Grauntes*, C. Profession appears not to be now a cause of forfeiture: *Re Metcalfe's Trusts*, 2 De G. J. & S. 122.

(*m*) Co. Litt. 132 a.

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It is the opinion of some authorities that an estate for the life of the grantee was originally the largest estate granted, and that it was not until feuds had begun to prevail more extensively that the estate of the tenant under a grant came to be descendible to his heirs (*n*), or capable of alienation. The right of every freeman, subject to certain restrictions, to alienate at his own pleasure was recognized by 18 Ed. I. c. 1 (*Quia Emptores*). The power of testamentary alienation was given as to estates in fee simple by the Statute of Wills, 32 Hen. VIII. c. 1, and as to estates held for the life of another by the Statute of Frauds (29 Car. II. c. 3), s. 12.

As we have said above, an estate for life is an estate of freehold, yet if a long term of years, longer than any possible duration of life, is granted to a person, but made determinable on his death, for example, a term of 500 years to A., if A. should so long live, this is not an estate for life, and is regarded not as an estate of freehold, but as a chattel interest only, and as being personal and not real property.

Gift of land to A. B. without words of limitation.

It might be supposed that, if lands were granted to a person even without the addition of any words indicative of an intention to extend the grant to his descendants—for example, to A. B. simply, instead of to A. B. and his heirs—A. B. would take the whole interest which the grantor had power to dispose of; and so it would be if, instead of land, the subject of grant were a movable chattel or other personal property, as a horse, a sum of money, or if, in the case of land the grant were of a term of years. But the extension of the grant to the heirs of the grantee was always necessary when it was intended to confer a descendible interest on the grantee. In any grant of lands, in the absence of words of inheritance, words of "limitation," as they are called, to the heirs, it was understood to have been the intention to grant the lands for life only: and the Courts held that a grant to A. conferred on A. no more than an estate for life (*o*). In the case of estates created by deeds, this rule is still in force; so that a limitation by deed "to A." simply, confers

(*n*) This statement is very questionable as applied to English law: see note (*o*), *infra*. And as to the earlier history of the right to alienate land in England, see Coke, 2 Inst. 65. P. & M. Hist. i. 313; *ib.* ii. 306.

(*o*) Feuds became hereditary about a century before the Conquest, at which time the law of England was profoundly modified by the doctrines of the feudal law introduced by the Norman lawyers. No conveyances of English lands made during the first century after the Conquest are known

on A. a life estate only (*p*); and that notwithstanding the maxim that every grant is to be construed most strongly against the grantor, unless in the case of grants by the Crown (*q*). Even in the case of wills made before 1838, unless a different intention was manifest from the context, the same rule was adopted. But the Wills Act, 1837 (*r*) has, so far as regards wills made after 1837, reversed the presumption of intention, enacting:—

> S. 28. "Where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by Will in such real estate, unless a contrary intention shall appear by the Will."

But while the law does not allow a grant or gift (except in wills), in the absence of words of inheritance, to confer more than a life estate, on the other hand, even if there are no words actually defining the estate as being for the life of the grantee himself, as where the grant is "to A. B." without more, it implies (in the absence of any expression to the contrary) an intention to confer an estate for the life of the grantee, in case the grantor has power (*i.e.*, a sufficient estate) to make such a grant. This is an application of the maxim referred to just now, namely, that every grant is to be construed most strongly against the grantor; for an estate for a man's own life is considered more beneficial and of a higher nature than an estate for any other life (*s*).

How created

An estate for life, being a freehold, can be created or transferred only by such assurances (*i.e.*, forms of conveyance) as are effectual for the creation or transmission of freehold interests. The nature of this class of assurances will be more fully considered in a future chapter (*t*).

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to exist; but it is most probable that the Norman lawyers employed the forms to which they were accustomed, and used the word "heirs," when they wished to confer an hereditary interest. However this may be, the distinction between grants containing the word "heirs" and those from which it is absent has always been recognized at the Common law. See P. & M. Hist. i. 288; *ib.* ii. 13.

(*p*) Elph. N. & C. Interp. 295.

(*q*) 2 Bl. 121; Elph. N. & C. Interp. 93.

(*r*) 7 Will. IV. & 1 Vict. c. 26. See Hawkins on Wills, 139.

(*s*) 2 Bl. 121; Co. Litt. 42 a. See also Co. Litt. 183 a, quoted in Elph. N. & C. Interp. 94, 95; Shep. T. 107.

(*t*) See p. 85 and Ch. XIV.

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Pur autre vie (*u*).

The ordinary estate for life, then, is that granted to a person for his own life. But, as pointed out above, an estate may be conferred for the life of another; and this may take place either by an original grant out of an estate in fee simple, or where a person, being himself tenant for life only, grants to another his own estate, in which case the interest acquired by the grantee is limited to the duration of the life of the grantor. In these instances, the estate is called an estate *pur autre vie*, that is to say, for the life of another, who is called the *cestui que vie*, and the grantee is called tenant *pur autre vie* (*x*).

General occupant (*y*).

A singular incident attached to an estate *pur autre vie*. Where the words limiting the estate to the tenant *pur autre vie* did not include his heirs or personal representatives, *i.e.*, if the grant was "to A." simply, there might be a hiatus or gap in the tenancy. This might arise in two manners: first, if the owner in fee simple made a grant to A. for the life of B.; secondly, if B., being tenant for his own life, assigned his life estate to A.; in either case, if A. were to die during the life of B., there would be no person entitled to succeed to the property. In the first case, the grantor having parted with the property during the life of B. would have no right of re-entry during B.'s life; in the second case, the grantor, having parted with all his estate, could never have a right of re-entry; and in either case, as A. took the estate *pur autre vie* during his own life only, there would be nobody entitled to claim through representation to him. The possession, or at least the right to it, would therefore become vacant, and the first person who entered would formerly have been entitled to retain this possession during the life of the *cestui que vie*. The possession thus acquired was called a General Occupancy, and the person obtaining it was styled a General

(*u*) Co. Litt. 41 b.

(*x*) An estate *pur autre vie* may arise:—"(1) By express limitation, which is either to a grantee simple, during the life of *cestui que vie*, or to a grantee and his heirs during such life. . . . (2) By the assignment to another person of an existing estate for life, which latter estate may have arisen either by act of parties, or by operation of law, as curtesy or dower; and the assignment is, like the express limitation, either to the grantee simply, or to him and his heirs, during the life of *cestui que vie*." (Challis, R. P., p. 325.) Other cases noticed by Mr. Challis were (formerly) where a life estate was cast upon the Crown by forfeiture for treason; the estate of "a general occupant:" as to which see the text *infra*; and the estate cast upon the personal representative of tenant *pur autre vie* since the Statute of Frauds: as to which see p. 37, *infra*.

(*y*) See Co. Litt. 41 b and Hargrave's notes; 1 Cruise, Dig. 110; *Holden* v. *Smallbrooke*, Vaugh. 187. There could be no general occupant of incorporeal

Occupant, and was entitled to hold the land for his own benefit during the life of the *cestui que vie*. But this result might be avoided by the extension of the limitation to the representatives of the tenant *pur autre vie* (*z*). Thus, for example, in the case put of the alienation by B., the tenant for life, if, instead of confining the limitation to A., it had been to A. and his heirs, or to A. and his executors (*a*), the estate upon the death of A. would have devolved, in the former instance, on his heirs, and in the latter on his executors, for the whole duration of B.'s life. The heir, in this case, was termed a Special Occupant, in contradistinction to a general occupant. But words of limitation to the heirs or executors might through inadvertence be omitted; and they would not enable the estate to be devised by will, nor subject it to the debts of the tenant *pur autre vie* after his death. The Statute of Frauds (*c*), however, empowered the tenant *pur autre vie* to dispose of his estate by will, and, if not devised, it was made chargeable in the hands of his heir taking as special occupant, as assets by descent, as in the case of lands in fee simple; and in case there was no special occupant, *i.e.*, where the heirs were not named in the grant, the estate was made to devolve on his executors or administrators, and to be assets in their hands (*d*). The provisions of that statute are the basis of the existing provisions of the Wills Act, 1837. That Act (*e*) extends the power of testamentary disposition to estates *pur autre vie*, whether there is or is not any special occupant. And it enacts:—

Special occupant (*b*).

Statute of Frauds.

Wills Act, 1837.

S. 6. "That if no disposition by will shall be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in

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hereditaments, Co. Litt. 41 b, nor of copyholds, *Smartle* v. *Penhallow*, 6 Mod. at 66.

(*z*) See Co. Litt. 41 b.

(*a*) See Hargrave's note (240) to Co. Litt. 41 b; where it is treated as a moot point whether before the statutes 29 Car. II. c. 3, and 14 Geo. II. c. 20, the executor or administrator could take even though named in the grant. See this question discussed in Cruise, Dig., vol. i., pp. 111, § 49, *et seq.*; Challis, R. P., p. 328; *Northen* v. *Carnegie*, 4 Drew, 587—591.

(*b*) See L. Q. R., vol. vi., p. 230.

(*c*) 29 Car. II. c. 3, s. 12, set out in 1 Cruise, Dig. 111.

(*d*) *Doe* v. *Lewis*, 9 M. & W. 664. See Co. Litt. 41 b, note (5), and *Earl of Mountcashell* v. *More-Smyth*, [1896] A. C. 158, where Lord Davey observed that, "where an estate *pur autre vie*, whether equitable or legal, is created without any designation of a special occupant, the law casts it, in the event of the death of the grantee, upon the executor" (or administrator). By 14 Geo. II. c. 20, s. 9, it was enacted, in explanation of the provision above referred to, that where there was no special occupant and no devise of an estate *pur autre vie*, it should be administered as part of the estate of the testator or intestate.

(*e*) 7 Will. IV. & 1 Vict. c. 26, s. 3.

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the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent (*f*), as in the case of freehold land in fee simple; and in case there shall be no special occupant of any estate *pur autre vie*, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator, either by reason of a special occupancy (*g*) or by virtue of this Act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate."

Thus general occupancy was abolished, and an estate *pur autre vie* was made liable to the deceased tenant's debts, into whosesoever hands it came.

Questions arose, upon the construction of this enactment, in case of an estate being limited to A. and his heirs for the life of B., first, where A. devised the property to C. "and his assigns," and C. died intestate, leaving an heir; and, secondly, where A. devised to trustees in trust for D., "his heirs, executors, administrators, and assigns," and D. died intestate without heirs (being illegitimate, and unmarried) to whom should the devised property pass on the deaths of C. and D. respectively? It was decided that in both cases it passed to the personal representative of C. and D. respectively, though in the latter case he would be the nominee of the Crown (*h*).

6 Anne, c. 18.

There remains to be noticed the statute 6 Anne, c. 18. This was passed to prevent the death of the *cestui que vie* being concealed, and enables any one claiming to be (*i*) entitled after his death to obtain from the Lord Chancellor an order for his production; and if he is not produced, he is to be taken to be dead (*k*).

(*f*) "The lands descended were called 'assets by descent,' from the French word *assez*, 'enough,' because the heir was bound only so far as he had lands descended to him enough or sufficient to answer the debt or contract of his ancestor." Wms. R. P. 262, referring to 2 Bl. 244.

(*g*) Thus recognizing the form of express limitation to the executor or administrator as special occupant.

(*h*) This was decided in *Doe* d. *Lewis* v. *Lewis*, 9 M. & W. 662, distinguished in *Wall* v. *Byrne* *per* Ld. St. Leonards), 2 Jo. & Lat. 118; and in *Reynolds* v. *Wright*, 25 Beav. 100 (on appeal, 2 De G. F. & J. 590, *per* Ld. Campbell, L.C.), in which *Doe* v. *Lewis* was followed. In *Reynolds* v. *Wright* it was further decided that the enactment applied as well to equitable as to legal estates.

(*i*) The jurisdiction has been transferred to the High Court of Justice Jud. Act, 1873, ss. 16, 17; Jud. Act, 1875, s. 3.

(*k*) For recent applications of this statute, see *Re Owen*, 10 Ch. Div. 166; *Re Stevens*, 31 Ch. Div. 320; *Re Pople*, 40 Ch. Div. 589.

Alienation.

At Common law a tenant for life, of whatever description, has the like power of alienation over the property as the holder of a larger estate, though limited of course to the duration of the estate itself—that is, the subsistence of the life or lives for which it is held (*l*). For this period he may lease, mortgage, or sell the property, and it is subject in his hands to be taken in execution for his debts, and on his bankruptcy will pass to his trustee in bankruptcy.

Conveyance—tortious;

At Common law if a tenant for life attempted to create an estate greater than his own life estate, this operated as a forfeiture of his estate (*m*) in the case of corporeal hereditaments, but not in the case of incorporeal hereditaments. He could make such a conveyance of corporeal hereditaments by two different kinds of assurances: first, *in pais*, by feoffment; secondly, by matter of record, as by fine or recovery (*n*). These assurances, if wrongfully made, had what was called a tortious operation, *i.e.*, they were effectual to create the estate which they purported to convey, though that estate might be afterwards defeated by enforcement of the forfeiture. He also incurred a forfeiture by claiming either as plaintiff or defendant in a real action an estate greater than an estate for life, or by affirming in such an action that the remainder or reversion was in a stranger, or by attorning to a stranger by matter of record. As real actions, with a few exceptions (*o*), and fines and recoveries (*p*) have been abolished, and as a feoffment is deprived of its tortious operation by the Real Property Act, 1845 (*q*), the only way in which a tenant for life, as such, can now forfeit his estate is by attorning to a stranger by matter of record. Conveyances (*r*) by way of bargain and sale inrolled, or by lease and release, or deed of grant, pass only that which the grantor can lawfully convey. They are therefore said to be innocent conveyances; and, if a tenant for life purports to convey an estate greater than one for his own life by such a conveyance, he incurs no forfeiture.

—innocent.

Emblements.

In some instances, the interest of a tenant for life is extended for certain purposes even beyond the expiration of his estate.

(*l*) As to his statutory powers of alienation see *post*, pp. 50, *et seq.*

(*m*) Co. Litt. 251 a, *et seq.*

(*n*) *Post*, pp. 66, 69.

(*o*) *Ante*, p. 7.

(*p*) Fines and Recoveries Act, 1833, 3 & 4 Will. IV. c. 74; *post*, p. 71.

(*q*) 8 & 9 Vict. c. 106, s. 4.

(*r*) See these explained, *post*, Ch. XIV.

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We have already explained (*s*) the nature of emblements, and it will be remembered that in the case of a tenant for life sowing the land, but dying before harvest, his executors have a right to the crop as a return to the tenant for his outlay. This right to emblements is not confined to the case of an estate for the life of the tenant for life himself. It exists (as modified by the statute about to be mentioned) where he is tenant *pur autre vie*. If the *cestui que vie* dies after the corn was sown, the tenant *pur autre vie* is entitled to the harvest.

The under-tenant of a tenant for life has a similar right to emblements, or rather, a more extensive right; for, if the life estate should determine by the tenant's own act, as by the marriage of a widow holding during widowhood, the tenant herself would have no right; but the act of the tenant is not to deprive the under-tenant, who could not prevent it, of the right (*t*).

In order "to prevent or lessen the evils of the right to emblements, and the loss and injury arising therefrom," the Landlord and Tenant Act, 1851, was passed (*u*), by which it was provided that on the determination of leases or tenancies held by tenants at rack-rent (*x*) under a tenant for life or for any other uncertain interest, the under-tenant, instead of being entitled to emblements, should continue to hold on the same terms to the end of the current year of his tenancy.

Apportionment of rent.

Where a tenant for his own life let the lands and died between two rent-days, there was, at Common law, no one to whom his lessee was liable to pay rent; for no part of the rent was considered to accrue until the day on which the whole was payable; in other words, at Common law, rent was not apportionable. To remedy some of the mischiefs and inconveniences thereby arising, various statutes have been passed, commencing with the Distress for Rent Act, 1737 (*y*); and finally by the Apportionment Act, 1870 (*z*), it was provided that all rents (whether reserved or

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(*s*) *Ante*, p. 23.

(*t*) 2 Bl. 123.

(*u*) 14 & 15 Vict. c. 25.

(*x*) "Rack-rent" is not used by lawyers in the meaning of extortionate rent. It means the best rent that can reasonably be obtained without taking any premium; in other words, the full annual value of the land. See 2 Bl. 43; *Re Elwes*, 3 H. & N. 719; *Stevens* v. *Barnet Water Co.*, 36 W. R. 924. See *post*, 77, note (*x*).

(*y*) 11 Geo. II. c. 19. See it set out in Smith L. & T. s. v., pp. 186, 187.

(*z*) 33 & 34 Vict. c. 35, ss. 2 and 7. See *Swansea Bank* v. *Thomas*, 4 Ex. D. 94; *Constable* v. *Constable*, 11 Ch. Div. 681.

made payable under an instrument in writing or otherwise) should, like interest on money lent, be considered as accruing from day to day, and be apportionable in respect of time accordingly; but (s. 7) the Act is not to apply where it is expressly stipulated that no apportionment shall take place.

Estovers.

"Every tenant for life," says Blackstone (*a*), "unless restrained by covenant or agreement, may (*b*) of common right take upon the land demised to him reasonable 'estovers' or 'botes,' for he hath a right to the full enjoyment and use of the land and all its profits during his estate therein."

The right to "estovers" (from *estoffer*, to furnish) is a liberty of taking necessary wood for the use or furniture of a house or farm; and "bote" is a Saxon word of the same signification (*c*).

Waste (*d*).

But a tenant for life must not, either by act or by neglect, injure or diminish the value of the inheritance—that is, the permanent substance of the property of which he is tenant in possession. Such injury is technically termed "Waste;" which may be either Voluntary or Permissive.

a. Voluntary waste.

Voluntary Waste consists in such positive acts as are destructive of, or injurious to, or alter the character of the property (*e*); for instance, pulling down or injuring buildings, cutting down timber, ploughing up ancient meadow-land, opening mines, or digging for gravel, brick earth, or stone. Mines, however, already opened, may be worked, and clay, gravel, &c., may be dug out of the pits already open (*f*). In *Phillipps* v. *Smith* (*g*), Alderson, B., said:—

"The principle upon which Waste depends is well stated in the case of *Lord Darcy* v. *Askwith* (Hobart, 234), thus:—'It is generally true that the lessee hath no power to change the nature of the thing demised; he cannot turn meadow into arable, nor stub a wood to make it pasture, nor dry up an ancient pool or piscary, nor suffer ground to be surrounded, nor destroy the pale of park, for then it ceaseth to be a park; nor he

(*a*) Vol. ii. 122.

(*b*) *I.e.*, as Coke puts it, "the law as incident to his estate without provision of the party" gives him the right to estovers; "and these estovers must be reasonable. . . . And the same estovers that tenant for life may have, tenant for years shall have:" Co. Litt. 41 b.

(*c*) See Elph. N. & C. Interp. 563, s. v. *Bote*.

(*d*) Co. Litt. 41 b; Coke, 2 Inst. 299; 37 Sol. J. 76.

(*e*) Even the making of new buildings, walls, fences, &c., or structural alterations, may be "waste." See as to such "ameliorating waste," *Jones* v. *Chappell*, L. R. 20 Eq. 539; *Doherty* v. *Allman*, 3 App. Cas. 709, at pp. 722, 724, 732; *Meux* v. *Cobley*, [1892] 2 Ch. 253; Leake, Us. & Prof. 95.

(*f*) *Viner* v. *Vaughan*, 2 Beav. 466.

(*g*) 14 M. & W. 589.

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may not destroy the stock or breed of anything, because it disherits and takes away the perpetuity of succession, as villains, fish, deer, young spring of woods, or the like.' Thus, the destruction of germins, or young plants destined to become trees (*h*), which destroys the future timber, is Waste, the cutting of apple-trees (*i*) in a garden or orchard, or the cutting down a hedge of thorns (*k*), which changes the nature of the thing demised, or the eradicating or unseasonable cutting of white-thorns (*l*), which destroys the future growth, are all acts of Waste. On the other hand, those acts are not Waste which, as Richardson, C.J., in *Barret* v. *Barret* (Hetley, 35) says, are not prejudicial to the inheritance; as, in that case, the cutting of sallows, maples, beeches, and thorns, there alleged to be of the age of thirty-three years, but which were not timber either by general law or particular local custom. So, likewise, cutting even of oaks or ashes where they are of seasonable wood—*i.e.*, where they are cut usually as underwood, and in due course are to grow up again from the stumps, is not Waste."

Timber.

"Timber" trees are such as serve for building or repairs of buildings. Oak, ash, and elm, are timber trees in all places; other trees may be timber by local custom, as, in some places, beech and whitethorn (*m*).

When timber was going to decay, the Court of Chancery, on the application of the tenant for life, would order it to be cut down and sold, and give the interest of the proceeds to the tenant for life (*n*).

In the case of *Honywood* v. *Honywood* (*o*) Jessel, M.R., thus stated the law as to what the tenant for life may cut and what he may not:—

"As I understand the law, it is this: The tenant for life may not cut timber. The question of what timber is depends, first, on general law, that is, the law of England; and, secondly, on the special custom of a locality.

"By the general law of England, oak, ash, and elm are timber, provided they are of the age of twenty years and upwards, provided also they are not so old as not to have a reasonable quantity of useable wood in them, sufficient, according to a text-writer (*p*), to make a good post. Timber, that is, the kind of tree which may be called timber, may be

(*h*) Co. Litt. 53 a.

(*i*) Coke says "any fruit-trees growing in the garden or orchard:" Co. Litt. 53 a.

(*k*) Co. Litt. 53 a.

(*l*) Vin. Abr. "Waste" (E.).

(*m*) Co. Litt. 53 a; Dart. V. & P. 149; and see the instances of local customs as to timber given in 1 Cruise, Dig., p. 116 (Tit. iii. s. 7). Larch trees are not timber. See as to windfalls of larches, *In re Harrison's Trusts*, 28 Ch. Div. 220, and *In re Ainslie*, 30 Ch. Div. 485.

(*n*) *Tooker* v. *Annesley*, 5 Sim. 135. See now Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 35, and *post*, p. 43.

(*o*) L. R. 18 Eq. 306, 309. On the question in whom is the property in the trees cut down vested, see continuation of passage quoted.

(*p*) Gibbons on Dilapidations, p. 215.

varied by local custom. There is what is called the custom of the country, that is, of a particular county or division of a county, and it varies in two ways. First of all, you may have trees called timber by the custom of the country—beech in some counties, hornbeam in others, and even whitethorn and blackthorn, and many other trees are considered timber in peculiar localities—in addition to the ordinary timber trees. Then, again, in certain localities, arising probably from the nature of the soil, trees of even twenty years old are not necessarily timber, but may go to twenty-four years, or even to a later period, I suppose, if necessary; and in other places the test of when a tree becomes timber is not its age but its girth. These, however, are special customs. Once arrive at the fact of what is timber, the tenant for life, impeachable for Waste (*q*), cannot cut it down. That I take to be the clear law, with one single exception, which has been established principally by modern authorities in favour of the owners of timber estates—that is, estates which are cultivated merely for the produce of saleable timber, and where the timber is cut periodically. The reason of the distinction is this, that as cutting the timber is the mode of cultivation, the timber is not to be kept as part of the inheritance, but part, so to say, of the annual fruits of the land, and in these cases the same kind of cultivation may be carried on by the tenant for life that has been carried on by the settlor on the estate, and the timber so cut down periodically in due course is looked upon as the annual profits of the estate, and therefore goes to the tenant for life (*r*). . . .

"The next question to be decided is, what can the tenant for life cut? The tenant for life can cut all that is not timber, with certain exceptions. He cannot cut ornamental trees, and he cannot destroy 'germins,' as the old law calls them, or stools of underwood; and he cannot destroy trees planted for the protection of banks, and various exceptions of that kind; but, with those exceptions, which are Waste, he may cut all trees which are not timber, with again an exception, that he must not cut those trees which, being under twenty years of age, are not timber, but which would be timber if they were over twenty years of age. If he cuts them down he commits Waste, as he prevents the growth of the timber. Then, again, there is a qualification that he may cut down oak, ash, and elm, under twenty years of age, provided they are cut down for the purpose of allowing the proper development and growth of other timber that is in the same wood or plantation. That is not Waste; in fact, it is for the improvement of the estate, and not the destruction of it, and therefore he is allowed to cut them down."

By the Settled Estates Act, 1877 (*s*), power is given to the Chancery Division of the High Court, if it shall deem it proper and consistent with a due regard for the interests of all parties, from time to time to authorize a sale of any timber (not being

(*q*) See *post*, p. 44.

(*r*) See *Dashwood* v. *Magniac*, [1891] 3 Ch. 306.

(*s*) 40 & 41 Vict. c. 18, s. 16 (repealing the Act 19 & 20 Vict. c. 120, commonly called the Settled Estates Act, 1856, which contained, in s. 11, a similar provision, and subsequent amending Acts). As to application of proceeds, see s. 34.

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ornamental timber) growing on any settled estates. And the Settled Land Act, 1882 (*t*), empowers the tenant for life (*u*) impeachable for waste in respect of timber—that is, not having the legal right to cut timber—on obtaining the consent of the trustees of the settlement or an order of the Court, to cut and sell timber ripe and fit for cutting; three-fourths of the net proceeds are to be set aside as capital, and the other fourth to go as rents and profits.

b. Permissive waste.

Permissive Waste consists in passive conduct which permits decay; as, for example, suffering buildings to fall into ruin.

There is no remedy against a tenant for life, or against his estate after his death, for Permissive Waste, where no express duty to repair is cast on him by the instrument treating his estate (*x*), but, on the other hand, in *Woodhouse* v. *Walker* (*y*), damages were obtained by the devisee in fee of premises for their non-repair against the executor of the devisee for life of the same, on the ground of Permissive Waste, the will expressly providing that such tenant for life should keep them in repair. The facts are shortly stated in the judgment of the Court, which contains all the learning upon the subject, and was delivered by Lush, J.:—

"The action is brought by the reversioner against the executor of a tenant for life, for Permissive Waste by the non-repair of some houses which had been devised to the wife of the testator for life with remainder to the plaintiff in fee.

"The devise was to the wife for her separate use during her life, 'she keeping the houses in repair.' She entered into possession on the death of her husband, and enjoyed the property for several years, but neglected to keep the houses in repair, and after her death the plaintiff entered and did the necessary repairs. This action is brought to recover out of her personal estate the expenses he has so incurred. It is remarkable that no direct authority is to be found for a case which must, we should suppose, have frequently occurred, and that we have to go back to first principles in order to find a solution of the question raised.

"Before the Statutes of Marlbridge (*z*) and of Gloucester (*a*), an action for Waste lay against a tenant in dower and tenant by the curtesy; but none against a tenant for life or years. The reason was, as stated by Coke, in 2 Inst. 300, 'for that the law created their estates and interests, therefore the law gave against them a remedy: but tenant for life or

(*t*) 45 & 46 Vict. c. 38, s. 35; and see s. 11.

(*u*) S. 2 (5), (6), (7), and ss. 58—62.

(*x*) *Re Carturight*, 41 Ch. Div. 532; Elph. Introd. 366.

(*y*) *Woodhouse* v. *Walker*, 5 Q. B. D. 404.

(*z*) 52 Hen. III.

(*a*) 6 Edw. I. c. 5.

years came in by demise and lease of the owner of the land, &c., and therefore he might in his demise have provided against the doing of Waste by his lessee, and if he did not, it was his negligence and default.'

"Here it is plainly implied that, where the grantor in his grant provides against the doing of Waste, the grantee will be liable for Waste in like manner as a tenant in dower or by curtesy was liable, and this is in perfect accordance with legal principle as expressed by the maxims, '*Qui sentit commodum, sentire debet et onus; et transit terra cum onere*' (*b*). The first of these maxims has a very wide application in our law. See Broom's Maxims.

"The Statute of Marlbridge, c. 23, extended the Common law liability by ordaining that 'fermors during their term shall not make Waste, sale, nor exile of house, woods, or men, nor of anything belonging to the tenements that they have to ferm without special licence had by writing of covenant making mention that they may do it, which if they do and thereof be convict, they shall yield full damage, and shall be punished by amerciament grievously.'

"The term 'fermors' here, says Coke (*c*), 'comprehended all who held by lease for life or lives, or for years by deed or without deed; and the words "do or make Waste" in legal understanding in this place (as well as in the Statute of Gloucester) include as well Permissive Waste, which is Waste by reason of omission or not doing, as for want of reparation, as Waste by reason of commission, as to cut down timber trees or prostrate houses and the like; for he that suffereth a house to decay which he ought to repair doth the Waste.'

"The 'special licence' mentioned in the Statute of Marlbridge is commonly expressed by the well-known phrase 'without impeachment of Waste' (*d*).

"The Statute of Gloucester gives, as a more stringent remedy, a writ of Waste, under which the tenant was liable to forfeiture of the thing wasted and treble damages.

"The right of action against a tenant for life belongs to the owner in fee of the immediate reversion.

"In course of time an action on the case founded on the Statute of Westminster 2, came to be substituted for the writ of Waste, as being a more simple and practical remedy, and the writ of Waste having fallen into disuse was ultimately abolished by 3 & 4 Will. IV. c. 27, s. 36. But the rights and liabilities of the parties remained as before, the remedy only being changed (*e*). It is not necessary in this case to enter into the question whether an action on the case for Permissive Waste can be maintained against a tenant for life or years, upon whom no express duty to repair is imposed by the instrument which creates the estate. The modern authorities, or rather the dicta upon this point, appear to be strangely in conflict with the ancient reading of the statutes (*f*).

"We think it must be held upon the principle before mentioned, that in this case the tenant for life was liable at Common law, and that the

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(*b*) Co. Litt. 231 a, and see *per* Holroyd, J., in *Burnett* v. *Lynch*, 5 B. & C. 607.

(*c*) 2 Inst. 145.

(*d*) *Post*, p. 46.

(*e*) *Bacon* v. *Smith*, 1 Q. B. 345.

(*f*) See notes to *Green* v. *Cole*, 2 Wms. Saund. 251.

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plaintiff as immediate reversioner had a right of action, and probably might have obtained an injunction against her for the Permitted Waste, if he had made such an application in her lifetime. The right of action which at Common law would have died with the person is continued by 3 & 4 Will. IV. c. 42, s. 2, against the executor (*g*), 'so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executor (*h*) shall have taken upon himself the administration of the estate and effects of such person.' The wrong of not repairing was a continuing wrong, giving a cause of action *de die in diem* up to the day of the death of the tenant for life, and the action was brought within six months after the death. The plaintiff, therefore, is entitled to recover by virtue of this statute."

Remedy.

Forfeiture of the estate, when incurred by the commission of an act of Waste, could formerly be enforced by a process called a "writ of Waste"—an action brought by the reversioner or remainderman against the tenant in possession. The Real Property Limitation Act, 1833 (*i*), however, abolishes a variety of old writs, including the "writ of Waste;" and the remedy of the reversioner or remainderman is now by action either for damages for wrong done, or for an injunction to prevent it.

c. Equitable waste.

Without impeachment of waste.

If the tenant for life is, by the express terms of the instrument creating his estate, made dispunishable for Waste, that is, if his estate is "without impeachment of Waste," he has a legal right (*k*) to cut down timber and open mines. But a Court of Equity will not permit an unconscientious use to be made of a legal right, and would therefore restrain him from pulling down or defacing the family mansion, cutting down timber planted or left standing for ornament or shelter (*l*), or doing other acts of spoliation; which are therefore called Equitable Waste. It is provided by the Judicature Act, 1873 (*m*):—

> S. 25, § 3. "An estate for life without impeachment of Waste shall not confer or be deemed to have conferred upon the tenant for life any legal right to commit Waste of the description known

(*g*) "Or administrator."

(*h*) *I.e.*, the date of the probate or letters of administration, in the absence of evidence that the executor or administrator took upon himself the administration of the estate before that date. See *In re Williams*, W. N. 1884, 242.

(*i*) 3 & 4 Will. IV. c. 27, s. 36. See *supra*, p. 45.

(*k*) See *Downshire* v. *Sandys*, 6 Ves. 107; and *Wombwell* v. *Belasyse*, *ib.* 110 c, note.

(*l*) *Ib.* 110 a. See notes to *Garth* v. *Cotton*, 1 W. & T.

(*m*) 36 & 37 Vict. c. 66, s. 25, § 3; see also § 11.

as Equitable Waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate."

In a recent case, where a tenant for life unimpeachable for Waste properly cut ornamental timber, it was decided that he was entitled to the proceeds. The whole doctrine of Equitable Waste was considered by Jessel, M.R. (*n*), in the following judgment:—

"An equitable tenant for life unimpeachable for Waste cut ornamental timber, and he alleged that he cut it, not only properly, but beneficially for the ornamental timber which remained; and accordingly an inquiry was directed in this form"—(His Lordship read it and continued):—"I need not trouble myself about the last part of the inquiry, because the first part of it has been answered in favour of the tenant for life; that is, in effect, that the trees which he did cut injured or impeded the growth of other trees which were of essential importance for ornament or shelter; in other words, he did that which the Court directed to be done in the cases of *Lushington* v. *Boldero* (*o*) and *Ford* v. *Tynte* (*p*). It seems that the trees cut were of considerable value, and of a value very much in excess of the cost of cutting; that is admitted; and, consequently, there was a considerable sum arising from the proceeds of the sale of the timber cut which went into the pocket of the tenant for life.

"The question I have now to decide on further consideration is, whether the equitable tenant for life unimpeachable for Waste is entitled to retain the proceeds of the timber so cut for his own use. If he is not, a second question arises which otherwise it is not necessary to discuss.

"The point, as I said before, does not appear to have been directly decided; but from the cases I am about to refer to, it seems to have been indirectly decided or assumed in favour of the tenant for life; and in deciding it, apparently for the first time, I have no hesitation in saying that, looking at the principles which have been laid down by the Court of Chancery as, so to say, the ground of its interference with the tenant for life in respect of what is commonly called 'ornamental timber,' that is, timber planted for ornament or shelter, it is impossible to hold that this tenant for life ought to be interfered with at all; that is to say his rights, such as they would have been had the timber not been ornamental, remain unaffected by what has occurred.

"The way to look at this matter is this: Courts of Equity restrained a legal tenant for life unimpeachable for Waste from committing some kinds of Waste which are called Equitable Waste. Why? Because it was considered that, though he had legal powers, he was not using them fairly—he was abusing them so as to destroy the subject of the settlement. That was the only ground, as it was said. Sometimes he was making an unconscientious use of his powers; and in fact the first case on the subject, the case of Lord Barnard (*q*), who, to spite the remainder-

(*n*) *Baker* v. *Sebright*, 13 Ch. Div. 183. See also *Lowndes* v. *Norton*, 6 Ch. Div. 139.
(*o*) 6 Madd. 149.
(*p*) 2 D. J. & S. 127, 129.
(*q*) 2 Vern. 738

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man, took off the roof of Raby Castle, was a very striking case of the unconscientious use of those powers.

"It does appear to me that the ground stated for the Court's interference quite represents the true view of the matter. The Court of Equity did interfere by injunction to restrain the act of the tenant for life, because it was an unconscientious use of his powers; and, therefore, unless the Court of Equity would restrain a tenant for life from doing the act, it ought not to deprive him of the proceeds of doing it, if what he was doing was not wrongful. The legal result of his act would follow in the same way as if no such doctrine as Equitable Waste were known; in other words, in the case put, he rightfully cuts the timber; and really it comes to that point. Now, if he rightfully cuts the timber, it must be plain that that cannot be called an unconscientious use of his powers, because he is doing that which not only the Court itself would allow, but by established rule will now direct to be done; and it seems to me impossible to say, when he has done that which was necessary, so to speak, in order to preserve the remaining timber for the purpose for which it was planted, that what he has done was improperly done. That does not necessarily refer to decaying timber that may be ornamental, and which the Court may order to be cut on the balance of convenience, since it orders it when the tenant for life is impeachable for Waste, in the ordinary course of management, and then the proceeds are invested for the benefit of the estate. It may be prudent to cut timber which is decaying, when to do so is beneficial for all parties, and when the Court has them all before it, although there is no absolute right to cut it, because it is ornamental timber. As we all know, there are oaks and other trees which will decay for centuries and still be ornamental. Therefore what I am saying does not necessarily apply to decaying timber, but it does apply to a case where the timber cut is impeding the growth of what I will call more ornamental timber; there cutting is the right thing to do.

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"If the tenant for life has only cut such of the ornamental trees as impeded the growth of the others, and such as were, as between the trees cut and those left standing, the most proper to be cut, how can I say he has acted unconscientiously or improperly? It seems to me I could not have granted an injunction against his doing this if he had shewn that what he intended to do was exactly what he has done; and that being so he is entitled to the proceeds."

Improvements.

Acts of Parliament have been passed in the present reign, enabling tenants for life to improve settled lands—*e.g.*, by draining, and to charge the expenses upon the inheritance. The Land Drainage Act, 1845 (8 & 9 Vict. c. 56), enables them to defray the expenses by way of mortgage; the Public Money Drainage Acts, 1846 to 1856 (*r*), by obtaining an advance of public money. To enable them to make improvements, not

(*r*) 9 & 10 Vict. c. 101; 10 & 11 Vict. c. 11; 11 & 12 Vict. c. 119; 13 & 14 Vict. c. 31; and 19 & 20 Vict. c. 9.

only by draining, but also by irrigation, embanking, enclosing, reclaiming, making permanent roads, railways, or canals, clearing, erecting buildings, planting for shelter, &c., the Improvement of Land Act, 1864 (*s*), was passed. To the list of improvements in that Act specified was added by the Limited Owners' Residences Act (1870) Amendment Act, 1871 (*t*), the erection, completion, improvement of, and addition to a mansion-house, suitable to the estate as a residence for the owner, and by the Limited Owners' Reservoirs and Water Supply Further Facilities Act, 1877 (*u*), powers to make waterworks (*x*).

Searches for Improvement charges.

Mr. Dart (*y*) points out the prudence of now searching for drainage and improvement loans on purchases of large estates, or of agricultural land of even moderate acreage. He says:—

"These incumbrances, where they exist, take priority of all other charges; and in more than one instance in the author's own experience, an omission to make the search would have involved serious consequences. The expediency of making it is not, however, as generally known in the profession as it ought to be."

Powers of Leasing, and of Sale and Exchange.

A further consequence of the limited nature of the ownership of a tenant for life is that, unless expressly empowered by the instrument creating his estate, or by Act of Parliament, he would be unable to grant leases to endure after the expiration of his own estate; and of course he could not alienate the land for any estate to endure after such expiration; so that if, as often happens, the persons entitled to the inheritance in remainder are unascertained or are infants, or otherwise incapable of making an effectual disposition, the fee simple in the land could not be sold or exchanged, however desirable it might be to deal with it. Powers of leasing and of sale and exchange were therefore in most cases expressly conferred by settlements

(*s*) 27 & 28 Vict. c. 114, extended by Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 30.

(*t*) 34 & 35 Vict. c. 84, amending the Limited Owners' Residences Act, 1870 (33 & 34 Vict. c. 56). See also Settled Land Act, 1890, 53 & 54 Vict. c. 69, s. 13.

(*u*) 40 & 41 Vict. c. 31.

(*x*) As to improvements under the Settled Land Acts, see *post*, p. 54.

(*y*) V. & P. 523. See also Elph. & Cl. Searches, 104; and the Land Charges Registration and Searches Act, 1888 (51 & 52 Vict. c. 51), s. 12, requiring improvement charges created after 1888 to be registered, in order to bind purchasers for value, at the office of the Land Registry; s. 13 requiring registration of charges created previously when they are assigned after 1888.

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and wills of land (*z*); and such powers have also been supplied or supplemented by various Acts of Parliament which we proceed to notice.

Settled Estates Acts.

The Act to facilitate Leases and Sales of Settled Estates (*a*) empowered any tenant for life, under a settlement made after 1st November, 1856, unless expressly forbidden by the settlement (*b*), to grant leases for twenty-one years, except of the principal mansion-house and demesnes thereof, and other lands usually occupied therewith (*c*). This provision was re-enacted in the Settled Estates Act, 1877 (*d*), by which also larger powers of leasing were given to the Chancery Division of the High Court (*e*), whatever the date of the settlement, than had been given under the previous Acts to the Court of Chancery (*f*). The term "settlement" is defined by the Act to signify any instrument or number of instruments by virtue of which any hereditaments, or any estates or interests therein, stand limited to or in trust for any persons by way of succession (*g*). Further, by the Act of 1856 (*h*), power was given to the Court of Chancery even to authorize a sale of the whole or part of any settled estates, and this provision also was re-enacted by the Settled Estates Act, 1877 (*i*); but the Court is not to exercise any of these powers if an express declaration that they shall not be exercised is contained in the settlement (*k*); there must be an express declaration to negative the power of the Court, otherwise, though the settlement contain powers, the Court may proceed under the Act (*l*).

Powers of Leasing, Sale and Exchange.

In Wills or Settlements of Real Estate, it has been usual, as we have said, to give power to the tenant for life, and then to the trustees during the minority of remaindermen, to lease (*m*); also to the trustees to sell or exchange with the consent of the

(*z*) See *post*, Ch. XI., as to these powers.

(*a*) 19 & 20 Vict. c. 120.

(*b*) S. 32.

(*c*) This power was exercisable without application to the Court. The Act contained (s. 2) provisions for other and more extensive leases (including building and mining leases) to be authorized by the Court upon application made to it.

(*d*) 40 & 41 Vict. c. 18, ss. 46, 57.

(*e*) S. 3.

(*f*) S. 4.

(*g*) S. 2.

(*h*) 19 & 20 Vict. c. 120, s. 11.

(*i*) 40 & 41 Vict. c. 18, s. 16.

(*k*) S. 38.

(*l*) The Act 19 & 20 Vict. c. 120, was amended by 21 & 22 Vict. c. 77, 27 & 28 Vict. c. 45, 37 & 38 Vict. c. 33, 39 & 40 Vict. c. 30; all were repealed by the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 58.

(*m*) See forms 2 K. & E. 580, *et seq.*

tenant for life(*n*). Where a power of sale or exchange was given, the provisions for carrying it out contained in the statute commonly known as Lord Cranworth's Act(*o*), were available, unless expressly negatived, or, so far as they were not varied by the deed, will, or other instrument creating the settlement(*p*). But those provisions were repealed as from the 31st December, 1882, by the Settled Land Act, 1882(*q*). In future, all express powers of leasing, sale, or exchange, may in general be omitted(*r*). For the Settled Land Act, 1882, which takes effect from and after 31st December, 1882, but is not confined in its operation to future settlements, enables a tenant for life to sell, lease, or exchange the settled land, subject to certain restrictions as to mansion houses, and parks and lands occupied therewith; provision being made for securing the purchase-money on a sale, or property taken in exchange, and otherwise for protecting the interests of the remainderman, and of others entitled under the settlement(*s*).

Settled Land Act, 1882.

A tenant for life for the purposes of the Act is defined to be the person who is for the time being under the settlement beneficially entitled to possession, or receipt of the rents and profits, of settled land for his life; if two or more persons are so entitled, they together constitute the tenant for life: and a person, being tenant for life within the meaning of the Act, is to be deemed to be such notwithstanding that the settled land or his estate or interest in it is incumbered or charged(*t*).

"Tenant for Life."

The "trustees of the settlement" are defined by the Settled Land Act, 1882, to be the persons, if any, who are for the time being trustees with power of sale of settled land, or with power of consent to or approval of the exercise of such a power of sale, or, if there are no such trustees, then the persons if any for the time being who are by the settlement declared to be trustees

"Trustees of the Settlement."

(*n*) See forms in 2 K. & E. 593, *et seq.*; and as to covenants to be implied in a conveyance under such a power, see Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 7 (1), (2), and (7); 1 K. & E. 400, 409, and Elph. Introd. 107.

(*o*) 23 & 24 Vict. c. 145, Pts. I. and IV.

(*p*) S. 32.

(*q*) 45 & 46 Vict. c. 38, ss. 1 and 64.

(*r*) See some exceptional cases in which they ought to be inserted, 2 K. & E. 537, note, 755, note. See the forms of express powers, *ib.* 580, *et seq.*

(*s*) As to the policy of the Settled Land Acts, see *Bruce* v. *Ailesbury*, [1892] A. C. 356.

(*t*) S. L. A., 1882, s. 2 (5), (6), (7), and (10); see also s. 19, as to tenants for life of undivided shares; s. 58 as to tenants in tail, and other persons having limited interests, who are likewise invested with the powers given by the Act to tenants for life: and ss. 59—62 as to Infants, Married Women, and Lunatics.

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thereof for the purposes of the Act (*u*). But, by the Settled Land Act, 1890 (*x*), if there are no "trustees of the settlement," as so defined, the following persons are to be trustees of the settlement, apparently for the purpose of sale only; viz. (i.) the persons who are, under the settlement, trustees with power of, or upon trust for sale of, any other land comprised in the settlement and subject to the same limitations as the land to be sold, or with power of consent to or approval of the exercise of such a power of sale; or, if there be no such persons, then, (ii.) the persons (if any) who are under the settlement trustees with future (*y*) power of sale, or under a future trust for sale, of the land to be sold, or with power of consent to, or approval of the exercise of such a future power of sale, and whether the power or trust takes effect in all events or not.

Sales and exchanges under S. L. Acts.

The tenant for life is empowered to sell or exchange (*z*) the settled land from time to time (*a*), and therefore also to contract to sell or exchange it (*b*), according to his own judgment and discretion, so that there is no necessity that the trustees of the settlement should take any steps to initiate and carry through the sale or exchange, or for the estate being put to the expense and delay of proceedings by a petition (*c*) in the Chancery Division under the Settled Estates Act, 1877; powers of sale and exchange are thus made incident to the estate of the tenant for life. But, to prevent abuse of these powers, it is provided that the sale or exchange must be at the best price or for the best consideration that can reasonably be obtained (*d*); that the tenant for life must have regard to the interests of all parties entitled under the settlement, and shall in exercising the powers of the Act be deemed to be in the position of a trustee for such parties (*e*); that the tenant for life shall, on request by a trustee of the settlement, furnish such particulars and information as may reasonably be required from time to time with reference

(*u*) S. L. A., 1882, s. 2 (8).

(*x*) 53 & 54 Vict. c. 69, s. 16.

(*y*) It had been held (in *Wheelwright* v. *Walker*, 23 Ch. Div. 752, 761) that the S. L. A., 1882, s. 2 (8), did not include trustees who had no present power of sale.

(*z*) Also to concur in partition, as to which see *post*, p. 260.

(*a*) S. L. A., 1882, ss. 3, 20 and 55.

(*b*) *Ib.* s. 31.

(*c*) See *ante*, p. 50.

(*d*) S. L. A., 1882, s. 4 (1). An exception to this requirement has been introduced in the case of sales for dwellings for the working classes, by 53 & 54 Vict. c. 70, s. 74, as amended by the Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 18.

(*e*) S. L. A., 1882, s. 53; *Re Radnor's Trusts*, 45 Ch. Div. 402; *Sutherland* v. *Sutherland*, [1893] 3 Ch. 169.

to sales, exchanges, &c., effected, or in progress, or immediately intended (*f*); that if a difference arises between the tenant for life and the trustees, either party may apply to the Court, that is, the Chancery Division of the High Court, the Court of Chancery of the County Palatine of Lancaster, or the County Court, as the case may be (*g*); that the principal mansion house and the pleasure grounds and park and lands usually occupied therewith are not to be sold without the consent of the trustees or an order of the Court (*h*); that the purchase-money in case of sale shall be paid either to the trustees or into Court, at the option of the tenant for life, for investment or application (*i*).

The Settled Land Act, 1890 (s. 12), provides, that where settled land is to be sold to the tenant for life himself, or an exchange is to be made with him of settled land for other land, the trustees of the settlement shall stand in the place of and represent the tenant for life.

Application of purchase-moneys.

If the purchase-money is paid to the trustees, the tenant for life is to direct the investment or application of it, and if he do not, it is in the discretion of the trustees, subject in that case, to any consent required or direction given by the settlement; and the investment must be in the names or under the control of the trustees (*k*); if the money is paid into Court, the investment or other application is to be made by the Court on the application of the tenant for life or of the trustees (*l*); an investment or other application once made cannot be altered during the life of the tenant for life without his consent (*m*). The money may be invested on any securities on which the trustees are authorized by the settlement or by law to invest (*n*). The income of the securities is to be applied as the income of the land would have been applicable if the land had not been sold (*o*); and the capital money and investments thereof are, for the purposes

(*f*) S. L. A., 1884, s. 5 (2).

(*g*) S. L. A., 1882, s. 44, and ss. 46, 47.

(*h*) S. L. A., 1890, s. 10. Where a house is usually occupied as a farmhouse, or where the site of the house, pleasure ground, park, and lands usually occupied therewith do not together exceed 25 acres, the house is not a principal mansion house within this section: *ib.* sub-s. (3). These restrictions apply to the grant of a right of way, or other easement, right or privilege, over the park and land usually occupied with the principal mansion house: *Sutherland* v. *Sutherland*, [1893] 3 Ch. 169, 194.

(*i*) S. L. A., 1882, s. 22.

(*k*) *Ib.* s. 22 (2).

(*l*) *Ib.* s. 22 (3).

(*m*) *Ib.* s. 22 (4).

(*n*) *Ib.* s. 21 (1).

(*o*) *Ib.* s. 22 (6).

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of disposition, transmission, and devolution, to be considered as land, and are to be held for and go to the same persons successively as the land which has been sold would have been held and have gone under the settlement (*p*). Purchase-money, instead of being invested on securities, may be applied in discharge of incumbrances and charges on settled land not sold and in other specified modes (*q*), including purchase of other land, improvements authorized by the Acts of 1882 and 1890 (*r*) for the benefit of the unsold land (*s*), or the Housing of the Working Classes Act, 1890 (*t*), and in payment of any moneys expended and costs incurred by a landlord under the Agricultural Holdings (England) Act, 1883 (*u*), in the execution of improvements, mentioned in the 1st or 2nd parts of the Schedule to that Act.

Improvements.

To enable trustees to apply capital money in their hands in payment for improvements authorized by the Settled Land Acts, 1882 to 1890, the tenant for life is required, previously to the execution of the improvement, to submit to the trustees a scheme (*x*) for the execution of the improvement shewing the proposed expenditure. The trustees, after they have approved of the scheme, may apply capital moneys on a certificate (i.) of the Board of Agriculture (*y*), or (ii.) of a competent engineer or able practical surveyor nominated by the trustees, and approved by the Board or the Court, certifying that the work or some portion of it has been properly executed and the amount properly payable in respect thereof; or (iii.) on an order of the Court authorizing them to so apply a specified portion of the capital money. Where the money is in Court (*z*) a like scheme must be

(*p*) S. L. A., 1882, s. 22 (5).

(*q*) *Ib.* s. 21 (ii.)—(xi.). See also 50 & 51 Vict. c. 30.

(*r*) S. L. A., 1890, s. 13. See last note.

(*s*) S. L. A., 1882, s. 25. Improvements within these provisions, or within those in the S. L. A., 1890, must be distinguished from mere repairs, which must be paid for out of income only; see *Clarke* v. *Thornton*, 35 Ch. Div. 307. In *Re Tucker's Settled Estates*, [1895] 2 Ch. 468.

(*t*) 53 & 54 Vict. c. 70, s. 74 (1), (*b*).

(*u*) 46 & 47 Vict. c. 61, s. 29.

(*x*) S. L. A., 1882, s. 26 (1), (2), (i.), (ii.), (iii.), and see ss. 44, 49; for form of scheme see 2 K. & E. 894.

(*y*) By the S. L. A., 1882, s. 48, the Commissioners bearing the three several styles of the Inclosure Commissioners for England and Wales, the Copyhold Commissioners, and the Tithe Commissioners for England and Wales, were under the style of the Land Commissioners for England consolidated into one body, and by the Board of Agriculture Act, 1889, 52 & 53 Vict. c. 30, the powers and duties of the Land Commissioners were transferred to the Board of Agriculture thereby constituted.

(*z*) S. L. A., 1882, s. 26 (1), (3), and see note (*y*), *supra*.

submitted to the Court; and it may, if it thinks fit, on a report or certificate of the Board, or of a competent engineer, or able practical surveyor approved by the Court, or on such other evidence as it thinks sufficient, make an order for the application of capital money in payment for the work or any part thereof.

Under the Settled Land Act, 1890 (*a*), the Court may make an order authorizing the expenditure of capital money on any improvement authorized by the Settled Land Acts, 1882 to 1890, notwithstanding that no scheme was, previously to the execution of the improvement, submitted to the trustees or the Court (*b*).

Land purchased or taken in exchange.

If land is purchased or taken in exchange or on partition, it is to be made subject to the settlement in the manner prescribed (*c*).

Leases by tenant for life.

The tenant for life is empowered to grant leases (*d*), and therefore also to contract to lease (*e*), but subject to the same restrictions as to mansion houses, &c., and the same checks against the abuse of such power as in the case of sale (*f*). He may lease the settled land or any part of it, or any easement, right, or privilege over or in relation to it, for ninety-nine years, in case of building leases, sixty years in case of mining leases, and twenty-one years in any other case (*g*). The best rent reasonably obtainable is to be reserved, regard being had to any fine taken, to money laid out or to be laid out for the benefit of the settled land, and generally to the circumstances of the case (*h*). If a fine is taken, it is to be deemed capital money arising under the Settled Land Act, 1882 (*i*), but it is to be laid out, invested, accumulated and paid by the trustees or the Court, in such manner as to give to the parties interested in the money the like

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(*a*) S. L. A., 1890, s. 15. See *Re Ormrod's Settled Estates*, [1892] 2 Ch. 318; *Re Tucker's Settled Estates*, [1895] 2 Ch. 468.

(*b*) As to the tenant for life's obligation to insure and repair improvements, and as to his liability for waste in executing improvements, see S. L. A., 1882, ss. 28, 29; S. L. A., 1887, s. 2.

(*c*) S. L. A., 1882, s. 24.

(*d*) *Ib.* s. 6.

(*e*) *Ib.* s. 31.

(*f*) See *ib.* ss. 15 (repealed and replaced by S. L. A., 1890, s. 10), 44, 45, 53, 54, and S. L. A., 1884 (47 & 48 Vict. c. 18), s. 5, see *post*, p. 56. See also as to leases not exceeding 21 years, which may be made without giving notice under s. 45 of S. L. A., 1882, and notwithstanding that there are no "trustees of the settlement," and as to mining leases, S. L. A., 1890 (53 & 54 Vict. c. 69), ss. 7, 8.

(*g*) S. L. A., 1882, ss. 6, 12, 20, and 55; and S. L. A., 1890, s. 7.

(*h*) S. L. A., 1882, s. 7 (2). A "fine" means a lump sum paid as part of the consideration for the lease. See *Chandler* v. *Bradley*, [1897] 1 Ch. 315.

(*i*) S. L. A., 1884 (47 & 48 Vict. c. 18), s. 4.

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benefit as they might lawfully have had from the lease; and any party interested in the money may apply to the Court (*k*).

In the case of a mining lease, unless a contrary intention is expressed in the settlement, where the tenant for life is impeachable for waste in respect of minerals, three-fourth parts of the rent, and in other cases one-fourth part, must be treated as capital, and set aside (*l*). Full powers are given to the tenant for life for developing the settled land for building (*m*), or mining (*n*). The Court may in certain cases (*o*) authorize the tenant for life to grant building or mining leases for any term or in perpetuity at fee-farm or other rents (*p*), and by the Settled Land Act, 1889 (*q*), building leases or agreements may contain an option for the lessee to purchase the land leased.

Surrender of leases.

A tenant for life is also empowered to accept, with or without consideration, a surrender of any lease of settled land in respect of the whole land leased or any part thereof, with or without an exception of the mines and minerals, and to grant a new lease (*r*).

Where money is required for equality of exchange, or partition, or to discharge an incumbrance on the settled land, the tenant for life may raise the same on mortgage of the settled land (*s*).

Notice to trustees.

A tenant for life, intending to make a sale, exchange, partition, lease, mortgage, or charge, must give a month's notice to each of the trustees of the settlement and also to their solicitor, if known to him; and at the date of the notice there must be at least two trustees, unless a contrary intention is expressed in the settlement; but the notice may be a general notice of intention in the case of a sale, exchange, partition or lease,

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(*k*) S. L. A., 1882, s. 34. This corresponds with the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), s. 74, and the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 37. See *In re Wilkes' Estate*, 16 Ch. Div. 597.

(*l*) S. L. A., 1882, s. 11. See *Re Ridge, Hellard* v. *Moody*, 31 Ch. Div. 504.

(*m*) S. L. A., 1882, ss. 8, 10, 13, and 16.

(*n*) *Ib.* ss. 9, 10, 13, 17.

(*o*) *Ib.* s. 10.

(*p*) See *post*, Ch. XII.

(*q*) 52 & 53 Vict. c. 36.

(*r*) S. L. A., 1882, s. 13. For old law as to surrender and grant of new leases, and as to concurrent leases, see Sugden on Powers, 777, *et seq.*; and Platt on Leases, 447, *et seq.* An express surrender must be by deed (29 Car. II., c. iii., s. 3; 8 & 9 Vict. c. 106, s. 3); but the acceptance of a new lease by a tenant under a current lease (*Ive's Case*, 5 Rep. 11 b) or even the grant of a new lease, with his assent, to a stranger who goes into possession (*Davison* v. *Gent*, 1 H. & N. 744; *Wallis* v. *Hands*, [1893] 2 Ch. 75) operates at law as a surrender of the original lease. See 1 K. & E. 865, note.

(*s*) S. L. A., 1882, s. 18; S. L. A., 1890, s. 11. The S. L. A., 1884, s. 5, does not apply to a mortgage, and therefore notice of intention to make the specific mortgage must be given to the trustees (*In re Ray's Settled Estates*, 25 Ch. Div. 464).

and a trustee may by writing under his land waive notice in any particular case or generally (*t*).

Protection of purchasers, lessees, &c.

On a sale, exchange, partition, lease, mortgage or charge under the Act, a person dealing in good faith with the tenant for life is as against all parties entitled under the settlement, to be conclusively taken to have given the best price, consideration, or rent, that could reasonably be obtained by the tenant for life, and to have complied with all the requisitions of the Act (*u*).

Protection of settled property.

The Act further provides that the Court may sanction any proceeding for the protection of settled land, or for recovery of land alleged to be subject to a settlement, and may direct payment of the costs out of property subject to the settlement (*x*).

Powers under Act cannot be released.

The powers of a tenant for life under the Act cannot be assigned or released, voluntarily or involuntarily; and a contract by a tenant for life not to exercise any of his powers under the Act is void (*y*), and any prohibition of the exercise of his powers is ineffectual (*z*); and, notwithstanding anything in the settlement, the exercise by the tenant for life of any power under the Act is not to occasion a forfeiture (*a*). The powers given by the settlement are not taken away or abridged by the Act, and the powers given by the Act are cumulative; but in case of conflict between the provisions of a settlement and those of the Act, the latter are to prevail; and notwithstanding anything in the settlement, the consent of the tenant for life is made necessary to the exercise by the trustees of the settlement or other person of any power (*b*) conferred by the settlement exercisable for any purpose

Conflict of powers.

(*t*) S. L. A., 1882, s. 45, as amended by S. L. A., 1884 (47 & 48 Vict. c. 18), s. 5. See *Marlborough* v. *Sartoris*, 32 Ch. Div. 616; *Hatten* v. *Russell*, 38 Ch. Div. 334; *Mogridge* v. *Clapp*, [1892] 3 Ch. 382. See also S. L. A., 1890, s. 7 (1) note (*f*), p. 55, and note (*s*), p. 56. If there are no trustees of the settlement within the definitions in S. L. A., 1882, s. 2 (8), and S. L. A., 1890, s. 16, trustees must be appointed under s. 38: *Wheelwright* v. *Walker*, 23 Ch. Div. 752.

(*u*) S. L. A., 1882, s. 54; see *Chandler* v. *Bradley*, [1897] 1 Ch. 315.

(*x*) S. L. A., 1882, s. 36, in substitution for s. 17 of the Settled Estates Act, 1877 (40 & 41 Vict. c. 18). For instances in which this section has been relied on, see *Re Earl of Aylesford's Settled Estates*, 32 Ch. Div. 162; *Re Jones*, 31 W. R. 399; *Stanford* v. *Roberts*, 52 L. J. Ch. 50.

(*y*) S. L. A., 1882, s. 50.

(*z*) *Ib.* s. 51. See *Re Hazle's S. E.*, 29 Ch. Div. 78; *Re Paget's S. E.*, 30 Ch. Div. 161; *Re Ames*, [1893] 2 Ch. 479. But though ineffectual to prevent a sale by the tenant for life, a forfeiture clause may operate if no sale be made; see *Re Haynes*, 37 Ch. Div. 306.

(*a*) S. L. A., 1882, s. 52.

(*b*) *Ib.* s. 56 (2). Distinguish *powers* from the *trusts* dealt with in S. L. A., 1882, s. 63; *post*, p. 80.

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provided for in the Act (*c*) and nothing in the Act is to prevent a settlor from conferring, on the tenant for life or the trustees, powers additional to or larger than those conferred by the Act (*d*).

Heirlooms (*e*).

Under the Settled Estates Acts, no power was given for the sale of chattels, as pictures, tapestries, plate, &c., strictly settled as heirlooms to go along with the estate. Except where the settlement was by will and debts of the testator remained unpaid, the Court, however beneficial a sale of such chattels might be for all parties interested, could do no more than authorize application to Parliament for an Act (*f*). Now, however, by the Settled Land Act, 1882 (*g*), power to sell such chattels is given to the tenant for life, but not without an order of the Court.

Infants. Married women. Lunatics.

Special provision is made by the Settled Land Act, 1882 (*h*), to meet the case of the tenant for life being "under disability" —that is to say, an Infant, Married Woman, or a Lunatic. If an Infant be tenant for life, his powers are to be exercised by the trustees of the settlement, or, if there are none, under the direction of the Court (*i*); if a Married Woman be tenant for life, the powers may be exercised by her alone, if she is entitled to the land for her separate use, and if not, by herself and her husband together (*k*); and if a Lunatic be tenant for life, the powers may be exercised by the Committee of his estate under an order of the Lord Chancellor or other person entrusted with the care of lunatics (*l*).

Conveyance by tenant for life to give title for benefit of creditors.

We may here notice an Act passed for the benefit of creditors, where a sale or mortgage of the lands of a testator is requisite for payment of his debts, and he has left them in settlement. The statute 11 Geo. IV. & 1 Will. IV. c. 47 (*m*), enabled the

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(*c*) S. L. A., 1882, s. 56 (3), which provides for the determination by the Court of any question or doubt arising as to any matter within the section. By the S. L. A., 1884 (47 & 48 Vict. c. 18), s. 6 (2), when several persons together constitute the tenant for life, the consent of one is to be sufficient.

(*d*) S. L. A., 1882, s. 57.

(*e*) See *ante*, p. 11.

(*f*) *D'Eyncourt* v. *Gregory*, 3 Ch. Div. 635, and see *Fane* v. *Fane*, 2 Ch. Div. 711.

(*g*) 45 & 46 Vict. c. 38, s. 37. See, for instances, *Re Duke of Marlborough's Settlement*, 32 Ch. Div. 1; *Re Houghton Estate*, 30 Ch. Div. 102; *Re Beaumont*, 58 L. T. 916; *Re Radnor*, 45 Ch. Div. 402.

(*h*) S. L. A., 1882, ss. 60—62.

(*i*) *Ib.* s. 60.

(*k*) *Ib.* s. 61. See *post*, p. 131.

(*l*) S. L. A., 1882, s. 62. See the Lunacy Act, 1890 (53 Vict. c. 5), s. 108. See *In re Ray*, [1896] 1 Ch. 468.

(*m*) S. 12 explained and extended by 2 & 3 Vict. c. 60, and 11 & 12 Vict. c. 87. These provisions are in practice superseded by the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 30, amended by the Trustee Act, 1893, Amendment Act, 1894 (57 Vict. c. 10), s. 1.

tenant for life under the direction of the Court of Chancery to convey to the purchaser or mortgagee.

Curtesy.
Dower.
Tenant in tail after possibility of issue extinct.

We have described the class of estates generally known as life estates, and their leading incidents. But, as was pointed out above, there are interests which in law are treated as life estates, because they are capable of continuing during the life of the tenant, though liable to earlier determination (*n*). The interests of a husband in the lands of his deceased wife, called "an estate by the curtesy of England," the dower estate of a wife in the lands of her deceased husband, and the estate of a tenant in tail after possibility of issue extinct (*o*), though falling, for some purposes, within the class of estates for life, are each of a distinct and peculiar nature, and will be best treated of under separate heads; therefore, the consideration of them is deferred to future chapters.

(*n*) *Ex. gr.*, Dower in gavelkind lands. A dowress has not the powers of a tenant for life. As to an estate tail after possibility, &c., see *post*, p. 62.

(*o*) See Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 2; and S. L. A., 1882 (45 & 46 Vict. c. 38), s. 58 (vii.) and (viii.).

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CHAPTER III.

ESTATES TAIL.

Estates tail —what.

AN Estate Tail, or, as it is more properly called, a "fee-tail" (*a*), derives its title from the French word *tailler* (to cut or abridge), from the restricted character which the Statute *De Donis* (as will presently appear) imposed upon estates of inheritance granted to a man and "the heirs of his body," or a particular class of heirs of his body.

While an estate for life is limited in its duration to the life of the original grantee himself—*i.e.*, the person to whom the estate has been granted—or, in the case of an estate *pur autre vie*, to the life or lives for which according to the grant the land is holden, an Estate Tail devolves upon successive owners in a course of descent; but it descends only to the heirs who issue from the body of the original donee (*b*), or person to whom the estate was originally granted, and, when such heirs are extinct, the estate tail ceases. The descent of an estate tail therefore differs in this respect from the descent of an estate in fee simple, which descends to the heirs general.

"Heirs general" are either lineal, *i.e.*, in the direct ascending or descending line, or collateral, *i.e.*, descending from some common ancestor. For example, the father or son of the *propositus* (*i.e.*, the person whose heir is to be ascertained) may be his lineal heir, while his uncle or nephew may be his collateral

(*a*) The word "entail" is sometimes popularly used to denote a settlement on A. for life with remainders over in tail, or for life and in tail. Such a settlement is called a "strict settlement" by lawyers.

As to estates tail, see Co. Litt. 18 b, *et seq.*; Challis, R. P., 259, *et seq.*

Mr. Challis (R. P. 50) considers "fee tail" to be the more ancient and proper designation of an estate tail. It is the term used in the Statute of Westminster II. (13 Edw. I. c. 46), and in Littleton, s. 18. See as to its origin 1 Cruise, Dig. 70, § 12.

(*b*) "Donee" is a term properly used as signifying the person to whom an estate tail is granted, the proper word to express the creation of an estate tail being "Gift" (*Donatio*); 4 Cruise, Dig. 51 (s. 33).

heir. The peculiarity of the descent of an estate tail is that only heirs in the direct descending line can take (*c*).

General: special.

An estate tail may be either "general," or "special." A gift to A. and the heirs of his body, is general, and only restricts the descent to heirs issuing from himself. But the restriction may be not only to heirs sprung from himself, but to the heirs of his body by a particular wife; or it may be to a woman and the heirs of her body by a particular man; and such limitations create an estate tail special.

A limitation to two persons who are husband and wife, or are capable of marrying one another, and the heirs of their bodies creates an estate in tail special (*d*). And an estate tail whether general or special, may be either in tail male, or in tail female; in which cases none but male descendants or female descendants respectively can inherit. Estates in tail female never occur in practice.

Male or female.

In each instance, however, the devolution within the class prescribed by the grant is according to the ordinary course of descent, as regulated by Common law or by local custom, except so far as such law or custom is affected by the Inheritance Act, 1833 (*e*), in respect to persons dying on or after 1st January, 1834. This course of descent is the subject of a later chapter (*f*). Thus, where there is no peculiar custom of descent, such as that of Gavelkind or that of Borough-English, the descent, in the case of a gift to A. and the heirs of his body, is to the eldest son, to the exclusion of all others; while where the land is subject to the custom of Gavelkind the descent is to all the sons, and where the land is subject to the custom of Borough-English it is to the youngest son (*g*); and so where the grant is to A. and the heirs male of his body or the heirs female of his body. The heir so indicated is the person on whom the inheritance devolves; and this applies also to estates in special tail.

Duration.

Every estate tail will, if left to descend, last so long as there exists issue of the prescribed character; and, on this failing, the land "reverts" to the original donor, or his heir, or "goes over"

(*c*) There are some very few cases in which the descent is traced not from the original donee, but from a deceased person. This occurs where the gift is to "A. and the heirs of the body of B.," a deceased person, and A. happens to be the heir of the body of B. See Elph. N. & C. Interp. 237, 238.

(*d*) See *post*, p. 251, as to the effect where such persons cannot lawfully intermarry.

(*e*) 3 & 4 Will. IV. c. 106, amended by 22 & 23 Vict. c. 35, ss. 19, 20.

(*f*) See *post*, Ch. V., p. 144.

(*g*) Bro. Ab. pl. 62.

All lands in Kent presumed to be Gavelkind.

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to the next prescribed line of succession. But this estate may be "barred," *i.e.*, may be so dealt with as to become expanded into a larger estate, so as both to get rid of the restricted character of the course of descent, and to defeat the remainders over and the reverter to the donor. At the present day, under the Fines and Recoveries Act, 1833 (*h*), generally speaking (*i*) every tenant in tail can, by deed duly enrolled, convert his estate into an absolute estate in fee simple.

Tenants in tail after possibility of issue extinct.

Where the limitation is in tail special, it may happen that, under given circumstances, it becomes impossible that there should be any issue (*i.e.*, heir of the body of the donee in tail) of the prescribed class; as where the estate is limited to A. and the heirs of his body begotten by him on a particular wife, and the wife dies leaving no issue. In such cases the tenant in tail is termed "tenant in tail after possibility of issue extinct" (*k*); he cannot bar the entail (*l*), and his estate is treated under the Settled Estates Act, 1877, and the Settled Land Act, 1882 (*m*), as a life estate; but he cannot be punished for waste, because he once had the inheritance. But in the case of an estate in tail general, however great may be the age of the tenant in tail, the law (*n*) considers that there is a possibility of issue, and the tenancy remains of its original character. This point, however, is practically material only in reference to the power of barring the entail just above adverted to (*o*).

Freehold.

As an estate for life amounts to a freehold, estates tail being larger than estates for life are also estates of freehold.

(*h*) 3 & 4 Will. IV. c. 74, ss. 15, 41.

(*i*) See *post*, p. 73.

(*k*) Co. Litt. 27 b, *et seq.*; Challis, R. P. 261, 263.

(*l*) 3 & 4 Will. IV. c. 74, s. 18.

(*m*) 40 & 41 Vict. c. 18, s. 2, and 45 & 46 Vict. c. 38, s. 58 (vii.), *ante*, p. 51.

(*n*) Co. Litt. 28 a. In the *Banbury Peerage Case* (in 1813) several instances were cited of men above 80 being known to have had children. The same presumption is not always in equity held to arise in regard to women. For instance, where a spinster, of the age of nearly 54, was entitled under her father's will to a share in his residuary estate absolutely if she had no children, but, in case of having a child or children, only for her life with a power of appointment among them, her share was ordered to be paid to her: *In re Widdow's Trusts*, L. R. 11 Eq. 408; and see *In re Millner's Estate*, L. R. 14 Eq. 245, where the woman was forty-nine years and nine months old, and she had been married twenty-six years, and had never had any children. On the other hand, the Court refused to treat as past child-bearing a woman aged fifty-four years and six months, who had never had any children, but had only been married three years: *Croxton* v. *May*, 9 Ch. Div. 388; and see *In re Warren's Settlement*, 52 L. J. Ch. 928; and cases cited in Dart, V. & P. 391.

(*o*) And see *post*, p. 73.

Except in wills, where technical language is not required, words indicative both of inheritance and procreation have until recently been necessary to create an estate tail. Thus, in a deed, an estate tail could not be created by such words as "to A. and his issue," or "to A. and his offspring" or "children" (*p*). Such words would, in a deed, create only a life estate. To create an estate tail by deed, there must have been a marking out or "limitation" of the estate, not only (as in the creation of an estate in fee simple) to the heirs, but also to the particular heirs, as to A. and the heirs of his body; that is, there must have been words of inheritance and of procreation (*q*). But in a will, a devise to a person and "his issue," *primâ facie*, confers on him an estate tail (*r*), and a devise to him and his "heirs male" confers on him an estate in tail male, though there be no words of procreation (*s*). There is a rule as to wills, known as the rule in *Wild's Case* (*t*), that, where there is a devise to a person and his "children," and he has no issue at the time of the devise, there, *primâ facie*, the word "children" will be held to be a word of limitation, and such person will take an estate tail.

Words of inheritance and procreation.

Rule in *Wild's Case*.

But, by the Conveyancing and Law of Property Act, 1881, in the case of deeds executed after the 31st December, 1881, it is sufficient in the limitation of an estate tail to use the words "in tail" without the words "heirs of the body," and in the limitation of an estate in tail male, or in tail female to use the words "in tail male" or "in tail female," as the case requires, without the words "heirs male of the body," or "heirs female of the body" (*u*).

Such is the character of an estate tail as recognized by English law at the present day; but for the better comprehension of the incidents attached to it, particularly that of its being convertible into an estate in fee simple, it will be instructive to trace its history (*x*).

Historical development.

(*p*) Elph. N. & C. Interp. 232.

(*q*) Elph. N. & C. Interp. 231, *et seq.*

(*r*) *Roddy* v. *Fitzgerald*, 6 H. L. C. 823.

(*s*) Co. Litt. 27 a; Hawkins on Wills, 173. In a deed, such a limitation would create a fee simple, the word "male" being rejected as repugnant: Elph. N. & C. Interp. 230 (Rule 72).

(*t*) 6 Rep. 17. See Tudor L. C. R. P. 669; Hawkins on Wills, 198; Theob. 346; *Clifford* v. *Koe*, 5 App. Cas. 447; *Bowen* v. *Lewis*, 9 App. Cas. 890.

(*u*) 44 & 45 Vict. c. 41, ss. 51 [1], and 4th Sched. IV.

(*x*) See the origin of estates tail explained in Digby, R. P., Chap. IV., § 3, pp. 220, *et seq.*; and 1 Cruise, Dig. 66, *et seq.*

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Conditional fee (*y*).

The restriction to the heirs of the body of the donee was no doubt originally designed to confine the succession to that particular class of heirs, so that the donor or his heirs would be entitled to resume possession of the land on failure of such heirs. By a strained construction, however, put in early times by the Judges upon grants of this description, a gift to a man and the heirs of his body was held to be a "fee simple conditional," that is, to be in the nature of a gift to him in fee simple, conditional on his having issue; and the donor's right of re-entry was held to accrue only on breach of the condition, *i.e.*, in case the donee had no issue. Thus, by the birth of issue the condition was said to be performed, and the estate accordingly to have become a fee simple, but only to the extent of conferring a general power of alienation for an estate in fee simple or any less estate, subjecting the land to forfeiture for the treason of the donee, and empowering the donee to charge the land. But, subject to any alienation, forfeiture, or charge, the original course of descent prevailed, and the land devolved on the issue; and, on their failure, the donor or his heirs had a right to re-enter (*z*).

The construction thus put upon these grants was extremely distasteful to the lords of whom the lands were holden. The creation of a power of alienation on the birth of an heir diminished the chance of the reverter of the estate to the lord; while, with every alienation, particularly if it was by way of subinfeudation, the rents and services reserved by the original grant became practically more difficult to enforce. This was partially remedied by Magna Charta (*a*), which enacted that no freeman should give or sell any more of his land than so as that the residue might be sufficient to answer the services he owed to his lord. But, practically, the exercise of the power of alienation, even as thus restricted, made the enforcement of the services more difficult; and this remedy in no way affected the diminished chance of reverter—*i.e.*, the right of resuming possession of the land on the failure of the issue.

Magna Charta.

(*y*) Co. Litt. 19 a; Plowden, 241; Challis, R. P. 236. See a most interesting article by Professor Maitland in 6 L. Q. R. 22; and P. & M. Hist. ii. 17.

(*z*) See the remarks of Butler in his note (s. vi., 7) to Co. Litt. 191 a, as to the nature and incidents of a fee simple conditional at the Common law; and see 1 Sand. Us. 210.

(*a*) See 2 Inst. 65; P. & M. Hist. i. 313.

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Statute *De Donis* (*b*).

By the reign of Edward I., this diminished possibility of reverter had become so strongly felt by the great barons, that their influence procured, in 1285, the enactment of the statute, known as the Statute of Westminster the Second, commonly called the Statute *De Donis* (*c*).

This statute enacted that from thenceforth the will of the donor should be observed *secundum formam in cartâ doni expressam*, and that the tenements so given (to a man and the heirs of his body, or the heirs male of his body or the like) should, notwithstanding any alienation by the donee, go after his death to his issue if there were any, or, if issue failed, should revert to the donor or his heirs (*d*). This abridgment of the power of alienation—the restriction of descent to the issue, and the reverter to the lord on their failure—was the cutting down adverted to at the opening of the chapter, and which gave to this estate the name of *feodum talliatum* or "fee tail" (*e*). It has, therefore, been observed that "a fee tail is simply a conditional fee at the Common law, modified in certain respects by the Statute *De Donis*." (*f*).

"Upon the construction of this Act of Parliament," says Blackstone (*g*), "the Judges determined that the donee had no longer a conditional fee simple, which became absolute and at his own disposal the instant any issue was born; but they divided the estate into two parts, leaving in the donee a new kind of particular estate, which they denominated a fee tail, and vesting in the donor the ultimate fee simple of the land, expectant on the failure of issue; which expectant estate is what we now call a reversion. And hence it is that Littleton tells us, that tenant in fee tail is by virtue of the Statute of Westminster the Second."

The result of this statute, however, shewed that the remedy of one grievance only called into existence another still greater. Blackstone (*h*) says:—

"The establishment of this family law occasioned infinite difficulties and disputes. Children grew disobedient, when they knew they could

(*b*) See 2 Inst. 33, 1.

(*c*) *I.e.*, *De Donis Conditionalibus*: 13 Ed. I. c. i.

(*d*) See the text of the statute set out in Digby, R. P. 224, *et seq.*

(*e*) The name according to Cruise (Dig., vol. i., p. 67) was far older than the Statute *De Donis*, and was known in feudal law in early times as that of estates created by limitations similar to those which in England at Common law created a fee simple conditional.

(*f*) Challis, R. P. 259.

(*g*) Vol. ii. 112; and see Coke, Pref. to Rep., Part IV., cited in Pollock on the Land Laws, p. 76.

(*h*) Vol. ii. 116. In addition to the authorities cited by Blackstone, see *Sir Anthony Mildmay's Case*, 6 Rep. 40 a; Bacon's argument in *Chudleigh's Case*, Works, Ed. Spedding, vol. vii., p. 617; *Martin* d. *Tregonwell* v. *Strahan*, 1 Wils. at 73; Piggott on Recoveries, 5.

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not be set aside: farmers were ousted of their leases made by tenants in tail; for, if such leases had been valid, then under colour of long leases the issue might have been virtually disinherited; creditors were defrauded of their debts; for, if tenant in tail could have charged his estate with their payment, he might also have defeated his issue, by mortgaging it for as much as it was worth; innumerable latent entails were produced to deprive purchasers of the lands they had fairly bought; of suits in consequence of which our antient books are full: and treasons were encouraged: as estates tail were not liable to forfeiture longer than for the tenant's life. So that they were justly branded as the source of new conventions and mischiefs unknown to the common law; and almost universally considered as the common grievance of the realm."

Common Recovery.

For a period of about 200 years the statute prevailed (*i*), but at length a decision of a Court of law (in the reign of Edward IV.) provided a remedy by means of the device, said to be of ecclesiastical invention, called a "common recovery" (*k*), and not only restored the power of alienation (*l*) which existed previously to the Statute *De Donis*, but enabled any tenant in tail (save only a tenant in tail after possibility of issue extinct), whether his estate was in possession or in remainder (but in the latter case only with the concurrence of the person having the prior estate of freehold in possession), not only to destroy the estate tail, that is, the descent to the issue, but also all subsequent estates in remainder, and the reverter to the lord, in other words, both the estate tail itself and all estates taking effect on its determination; and to convert the estate tail into one in fee simple (*m*).

The device of a "Common Recovery" is said to have been originally adopted in order to evade the provisions of Magna

(*i*) The statement in the text expresses the received opinion, but one of the Editors has advanced reasons for considering this opinion to be erroneous in L. Q. R., vol. vi., p. 280.

(*k*) 2 Bl. 117, 271.

(*l*) See Challis, R. P. 260.

(*m*) At Common law a recovery suffered by a tenant in tail where the reversion was in the Crown barred his issue but did not bar the Crown. The Act 33 & 34 Hen. VIII. c. 20, rendered a recovery by a tenant in tail void where the land was granted or otherwise provided by the Crown in tail "for service done to the Kings of the Realm," and where at the time of the recovery the reversion or remainder was in the Crown. This statute is discussed very minutely in Co. Litt. 372 b. See also *Murrey* v. *Eyton*, T. Raym. 260, 319, 338; *Perkins* v. *Sewell*, 4 Burr. 2223; S. C., 1 W. Bl. 654; *Johnson* v. *Derby*, 2 Show. 104; 5 Cruise, Dig. 414, *et seq.* By the effect of the Fines and Recoveries Act, 1833 (3 & 4 Will. IV. c. 74, ss. 15 and 18) a tenant in tail can bar the reversion of the Crown in all cases where he can bar his own issue, *i.e.*, in all cases where the issue are not protected by 33 & 34 Hen. VIII. c. 20. See *Abergavenny* v. *Brace*, L. R. 7 Ex. 145.

Charta(*n*) prohibiting alienation "in mortmain" (*in mortuâ manu*), that is, alienation of lands or tenements to any corporation, whether ecclesiastical or lay(*o*). Mortmain.

"But," says Blackstone, "these purchases have been chiefly made by religious houses, in consequence whereof the lands became perpetually inherent in one dead hand; this hath occasioned the general appellation of mortmain to be applied to such alienations, and the religious houses themselves to be principally considered in forming the Statutes of Mortmain" (*p*).

The device by which the monks contrived to defeat the statutes was a fictitious action (*q*), brought by the religious house against the tenant in possession, for the recovery of the lands in question; and its effect was that, notwithstanding the statutes, the religious corporation obtained, by judgment of the Court, a good title to the lands. The monks set up a fictitious title to the land; the tenant, that is, the person holding the land for an estate of freehold in possession, acting in collusion with the monastery, made no defence to the action, and judgment was therefore given for the religious house. The earlier Statutes of Mortmain were addressed in terms only to gifts and conveyances between the parties, and did not apply to actions; but the Statute of Westminster the Second (*r*) was directed against the device of a collusive action, or "recovery," as a means of effecting alienation in mortmain. The device of a "recovery," however, was not forgotten, and in the reign of Edward IV.(*s*) its application to estates tail was brought before the Court in a case which, from the name of one of the original actors in it, has been handed down to posterity under the name of *Taltarum's Case* (*t*). The case is said to have been brought into Court under the direct encouragement of the King (*u*); who, in the disputes between

Taltarum's Case.

(*n*) *Magna Charta*, c. 43 (ed. 1217). See Digby, R. P. 132, where the text of this provision is given. See also the *Statutum de Viris Religiosis*, 7 Ed. I. stat. 2, c. 13; Digby, R. P. 217; P. & M. Hist. i. 315.

(*o*) See Digby, R. P. 215; and *post*, p. 88 *et seq.*

(*p*) 2 Bl. 268.

(*q*) 2 Bl. 271; 2 Inst. 429. "Recovery" means properly any real action in which land was recovered (5 Cruise, Dig. 268; Co. Litt. 154 a); but it is generally used to denote a fictitious action.

(*r*) 13 Ed. I. c. 32 (set out in Digby, R. P. 219).

(*s*) A.D. 1473. See 6 L. Q. R. 287.

(*t*) 2 Bl. 117; Challis, R. P. 280, where the effect of the case is stated. It is reported in the Year Book for Mich. Term, 12 Ed. IV., fol. 19 a; see the translation in Digby, R. P. 253; and see 9 L. Q. R. 1; 12 L. Q. R. 30.

(*u*) Piggott on Recoveries, 8. But the learned author gives no authority for this statement.

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the Houses of York and Lancaster, observing how little effect attainders for treason had on families whose estates were protected by entails (*x*), desired to introduce, through the instrumentality of the Courts of law, a means of destroying them.

The "common recovery" operated to defeat not only the estate tail, but also the remainders and reversion expectant on it, and converted the estate of the tenant in tail into an estate in fee simple. For instance, where lands had been given by A. to B. and the heirs of his body, and in default of such issue to C. and the heirs of his body, the effect of a recovery was that the issue of B., the estate "in remainder" to C., and the reversion of A. and his heirs were all barred (*y*).

The proceedings in a common recovery were as follows: In the writ (called a "*præcipe quod reddat*," from its initial words) by which the action was commenced, it was alleged that the tenant, *i.e.*, the person in possession, had no legal title to the land, but that the demandant, *i.e.*, the plaintiff, having originally had the possession, had been wrongfully deprived of it by the party through whom the "tenant," *i.e.*, the defendant holding the land, claimed (*z*). The answer of the defendant was, that the party from whom he derived his title had warranted the possession to him, and therefore that he should be vouched to warranty, *i.e.*, called upon to defend it. The party thus called upon, termed the "vouchee" (from *vocatio*, "calling"), practically admitted the warranty, and then suffered judgment to go against him by default. The judgment of the Court therefore was, that the demandant, then called the "recoveror," should recover the lands against the tenant, then called the "recoveree," and that the latter should recover lands of equal value, as a recompense, against the supposed warrantor, which recompense, if actually given, would have gone in substitution for the lands recovered, and been subject accordingly both to the entail of those lands and to all estates in remainder or reversion expectant upon its termination. It is true the recompense which was the supposed support of the judgment was fictitious; but there was a possibility in the contemplation of law of its being made, and there was a judgment of the Court for the recovery;

(*x*) Estates tail were not liable to forfeiture longer than for the tenant's life. (2 Bl. 116.)

(*y*) As to "remainders" and "reversions," see *post*, Ch. VIII., p. 227.

(*z*) 2 Bl. 358.

in other words, a judgment awarded the restitution of the lands to the demandant, and this upon the theory of absolute right in the demandant. The result was that the recoveror acquired by the judgment a legal title in fee simple to the lands recovered, the sheriff was directed to give him seisin of the land, and the recovery operated as a conveyance to him of the fee simple(*a*), and he obtained seisin from the sheriff. Where the object was to vest the fee simple in the tenant in tail himself, this was effected by a subsequent conveyance by the recoveror to the tenant in tail (*b*).

"These recoveries," says Blackstone in 1765 (*c*), "however clandestinely begun, are now become by long use and acquiescence a most common assurance of lands; and are looked upon as the legal mode of conveyance, by which tenant in tail may dispose of his lands and tenements; so that no Court will suffer them to be shaken or reflected on, and even Acts of Parliament have by a side-wind countenanced and established them."

Fine (*d*).

An estate tail could also be affected and a restricted power of alienation be acquired by the tenant in tail, by means of another fictitious process called a "fine," which only barred, that is, defeated the succession of, the issue in tail, but had no effect on the remainders or the reversion.

A "fine," like a recovery, was an action brought in the name of a friendly party to whom the land was to be conveyed or assured, against the person who was to convey it; and in form it was founded on an alleged covenant by the defendant (called the "*deforciant*" or "*conusor*") to convey the lands to the plaintiff (called the "*complainant*" or "*conusee*"). It was called a Fine from the Latin word "*finis*," or end; because, it was said, it put an end, not only to the suit then commenced, but to all other controversies concerning the same matter. It was a process, as Blackstone (*e*) tells us, of equal antiquity with the first rudiments of the law, though its application to the barring

(*a*) For full account, see 2 Bl. 357; and *ib.* Appendix V., p. xvii.; and see the process described in Pollock on the Land Laws, 78, *et seq.*; Challis, R. P. 281, *et seq.*; and see the modern form of a Common Recovery in Stud. Prec. 136.

(*b*) Or, in later times, by a deed declaring the uses to which the recoveror was to stand seised, and operating under the Statute of Uses.

(*c*) Vol. ii. 117.

(*d*) As to fines, see 5 Cruise, Dig., tit. xxxv.; Challis, R. P. 276.

(*e*) 2 Bl. 349; Digby, R. P. 105, 227, note 2; P. & M. Hist. ii. 94; and see the forms of the writ and subsequent proceedings, 2 Bl., App. IV., p. xiv.; Stud. Prec. 131.

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of an entail was somewhat later than that of the recovery. A recovery proceeded through all the stages of an action to a final judgment; but a fine was, in theory, a compromise of the action, by leave of the Court, on the defendant admitting the right claimed by the plaintiff. The defendant was alleged to have covenanted with the plaintiff to convey to him the lands in question, and the purpose of the action was to enforce the covenant. By the compromise the defendant acknowledged the right of the plaintiff, but, the plaintiff having, as the forms of procedure required, given pledges to the Court to prosecute the action, it was necessary to obtain the sanction of the Court to abandon it. This sanction converted the arrangement into a judicial one, and was called the licence to agree. This Concord or agreement was the substantive and effective part of the fine. It was followed by enrolment and record of the whole proceedings; and latterly, the process was completed by proclamations, that is, a public announcement of the transaction in open Court. The Court held four sittings in each year, called terms, and the fine had to be proclaimed four times in the term in which it was levied, and four times in each of the three succeeding terms (*f*).

Operation of fines on estates tail.

In the case of an estate tail, the Statute *De Donis* (13 Ed. I. c. 1, *ante*, p. 65) in 1285 expressly provided that a fine by a tenant in tail should not bind his issue in tail, or the reversioner. In other cases, by a statute of 1290, a fine was made binding on all persons who failed to put in their claim within a year and a day from the time of levying the fine (*g*). Proclamations were introduced in 1299 (*h*), but in 1360 the effect of non-claim in barring the right was abolished for a time by 34 Ed. III. c. 16, which allowed persons to claim and to falsify a fine at any distance of time (*i*): "whereby," as Sir Edward Coke observed, "great contention arose, and few men were sure of their possessions, till the Parliament held 4 Hen. VII. (c. 24), confirming 1 Rich. III. c. 7, reformed that mischief, and excellently

(*f*) Reduced to once in each term by 31 Eliz. c. 2. It was the duty of the "chirographer" of fines every term to write out and exhibit a table of fines levied in each county: 2 Bl. 352.

(*g*) See Statute *De Modo levandi fines*, 18 Ed. I., stat. 4, quoted 2 Bl. 354; 2 Inst. 510; 5 Cruise, Dig. 150; but it is said that its statutory origin is very doubtful: P. & M. Hist. ii. 98, note (4).

(*h*) *Statutum de Finibus levatis*, 27 Ed. I., stat. 1, c. 1; 5 Cruise, Dig. 90; 2 Inst. 521; P. & M. Hist. ii. 101.

(*i*) See 5 Cruise, Dig. 152; Co. Litt. 262 a.

moderated between the latitude given by the statute and the Common law." For while these statutes restored the doctrine of non-claim, they required proclamations to be made, and barred the right of strangers as well as privies in case they had not made claim within five years after proclamation made (*k*). It would seem that there was a doubt whether the statutes 1 Rich. III. c. 7, 4 Hen. VII. c. 24, were intended to enable a tenant in tail to bar his issue by a fine and so to abrogate the provisions of the Statute *De Donis* in this respect, though there was a judicial decision in the affirmative; but the doubt was removed by the statute 32 Hen. VIII. c. 36, which enacted that a fine when levied with proclamations according to 4 Hen. VII. c. 24, by any person of full age to whom or to whose ancestors lands had been entailed, whether they were in possession, reversion, or remainder, should be a perpetual bar to them and their heirs claiming by force of such entail (*l*), and the bar was immediate (*m*). But the statutes did not give to a fine by a tenant in tail the effect of barring remaindermen or reversioners; they had still a right of entry or of action when the tenant in tail who had levied the fine was dead and his issue failed. Though, since the Statute of 32 Hen. VIII. c. 36, fines were always levied with proclamations, except in some few cases, where the proclamations were omitted by accident, yet trouble and expense were often incurred in procuring evidence that they were so levied; it was therefore provided by 11 & 12 Vict. c. 70, that all fines theretofore levied in the Court of Common Pleas should be conclusively deemed to have been levied with proclamations (*n*).

Abolition of fines and recoveries.

Both fines and recoveries have now been abolished by the Fines and Recoveries Act, 1833 (*o*). In order, however, to a due understanding of that Act, it is necessary to state further that a recovery was not effectual unless the recoveree (*i.e.*, the person against whom the action was brought, or "tenant to the præcipe") was actually seised of the freehold (*p*). But a fine could be levied

(*k*) 2 Inst. 518.

(*l*) 2 Bl. 355.

(*m*) Wms. R. P. 97, where it is observed that the 32 Hen. VIII. c. 36 confirmed a judicial construction of the Statute of Hen. VII., which, "quite apart, as it should seem, from its real intention, gave to a fine by a tenant in tail the effect of a bar to his issue after non-claim by them for five years after the fine." See 5 Cruise, Dig. 154, *et seq.*; Hargrave's note (1) to Co. Litt. 121 a; Challis, R. P. 277.

(*n*) See 2 Bl. 352, for description of proceeding by fine, *Sur cognizance de droit come ceo*, &c., which was the usual one.

(*o*) 3 & 4 Will. IV. c. 74. See Shelford R. P. Stat.

(*p*) 2 Bl. 362.

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of a reversionary estate. Thus, where land was settled upon A. for life, with remainder to B. in tail; during the subsistence of A.'s life estate no recovery could have been had, or, as it is technically called, "suffered," by B. without the concurrence of A. For a recovery to have been suffered in such case, the tenant for life A. (or any person whom A., having conveyed to him an estate of freehold, had made tenant to the præcipe) must have been defendant in the action, in which he would vouch B. the remainderman in tail, and he in turn would vouch the "common vouchee" (*q*). But a fine might be levied by B. notwithstanding the antecedent estate in A., and that fine would be operative on the estate tail whenever it fell into possession. Again, a recovery converted the estate into an absolute fee simple, while a fine only converted it into what was called a "base fee," that is, an estate which would endure only so long as there was in existence some person fulfilling the description of the prescribed line of heirs to whom the estate tail was limited, and on the failure of these, the title of the reversioner or of persons claiming under limitations subsequent to the estate tail took effect notwithstanding the fine (*r*). From the time of the Statute *De Donis* down to the passing of the Fines and Recoveries Act, 1833, fines and recoveries were the usual means adopted for the destruction or modification of estates tail (*s*). That Act, however, provided a new and simple method, and, in effect (subject only to the exceptions which will be pointed out), empowered all tenants in tail, whether entitled in possession, remainder, contingency, or otherwise, to defeat not only the estate tail, but all estates expectant upon its termination; and to acquire and dispose of an estate in fee simple or any less estate.

Base fee.

The Act provided (s. 15) that:—

> "After the thirty-first day of December, one thousand eight hundred and thirty-three, every actual tenant in tail, whether in possession, remainder, contingency, or otherwise, shall have full power to dispose of, for an estate in fee simple absolute or for any less estate, the lands entailed, as against all persons claiming the

Fines and Recoveries Act, 1833, 3 & 4 Will. IV. c. 74, s. 15.

(*q*) So called from being generally thus vouched; he was usually the crier of the Court: 2 Bl. 359, and see 362.

(*r*) In some few cases, not adapted to the consideration of students, estates tail in remainder might be wholly or partially barred by the operation of the warranty contained in the concord of the fine. See L. Q. R., vol. vi., p. 280.

(*s*) As to the method of barring an estate tail wholly or partially by a feoffment and warranty, see L. Q. R., vol. vi., p. 280.

lands entailed by force of any estate tail which shall be vested in or might be claimed by, or which but for some previous Act would have been vested in or might have been claimed by, the person making the disposition, at the time of his making the same, and also as against all persons, including the King's most excellent Majesty, his heirs and successors, whose estates are to take effect after the determination or in defeasance of any such estate tail; saving always the rights of all persons in respect of estates prior to the estate tail in respect of which such disposition shall be made, and the rights of all other persons, except those against whom such disposition is by this Act authorised to be made."

Disposition by deed.

The disentailing disposition can be effected by any deed by which the tenant in tail could have disposed of his estate if it had been "an estate at law in fee simple absolute," provided the deed be enrolled in the Court of Chancery (now in the Central Office of the Supreme Court) within six months from its execution (*t*).

Excepted cases.

The cases excepted from the Act are estates tail after possibility of issue extinct; estates tail granted by the Crown as the reward of public services, the reversion still remaining in the Crown (*u*); and (*x*) estates tail at the date of the Act subsisting in females in lands of their deceased husbands or given by any of the husband's ancestors, which were called estates tail *ex provisione viri*, but which, in modern times, had become obsolete (*y*), and for the future were abolished by the same Act (*z*).

Protector of Settlement.

Where an estate tail is not in actual possession, but is in remainder expectant on the determination of some antecedent freehold estate, created by the same instrument (*a*), as, for example, where A. is tenant for life in possession, and B. is tenant in tail in remainder, and A. is living, the statute adopts the principle of the recovery, requiring the concurrence of the owner of the life estate in order to defeat remainders and reversions expectant upon it. The person whose concurrence is thus required is called the protector of the Settlement (*b*); but in lieu of him the settlor may appoint any number of persons *in esse* not exceeding

(*t*) 3 & 4 Will. IV. c. 74, ss. 15, 40, 41. And see Rules of the Supreme Court, Ord. LXI. r. 9. Forms of disentailing assurance are given in Stud. Prec. 79, 80; Dav. Conc. Prec., pp. 591, *et seq.*; Dav. Prec., vol. iii., Part II., and K. & E., vol. i.

(*u*) S. 18, *ante*, p. 66, note (*m*).

(*x*) S. 16.

(*y*) Perhaps this statement is too positive; one of the Editors has met with an estate of this nature in practice.

(*z*) S. 17.

(*a*) See *Berrington* v. *Scott*, 32 L. T. (N. S.) 125.

(*b*) See s. 22 for the definition of the "Protector."

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three (*c*). But the tenant in tail in remainder may still, without the protector's consent (as before the Act he could by levying a fine), bar his issue and create a "base fee," which estate, during the continuance of such issue, will be subject to his disposition, or descend to his heirs as if it were a fee simple. Where the owner of a base fee becomes entitled to the immediate remainder or reversion in fee, as by the person entitled in remainder or reversion releasing his interest to him, the base fee is enlarged into as large an estate as the tenant in tail with the consent of the protector might have created: for the Act provides:—

3 & 4 Will. IV. c. 74, s. 39.

S. 39. "That if a base fee in any lands, and the remainder or reversion in fee in the same lands, shall at the time of the passing of this Act, or at any time afterwards, be united in the same person, and at any time after the passing of this Act there shall be no intermediate estate between the base fee and the remainder or reversion, then and in such case the base fee shall not merge, but shall be *ipso facto* enlarged into as large an estate as the tenant in tail with the consent of the protector, if any, might have created by any disposition under this Act, if such remainder or reversion had been vested in any other person."

On the purchase, then, of lands from a tenant in tail, it is necessary to the validity of the disentailing deed as against the issue in tail, remaindermen, and reversioners, that it be enrolled within six calendar months after its execution by the vendor (*d*); and, if so enrolled, it will take effect from the time of execution, except as against persons claiming for valuable consideration under a deed previously enrolled (even if subsequently executed) and without express notice of the estate created by the previously executed deed (*e*). If there be a protector of the settlement, and such protector's consent be given by a separate deed, that is, not by the disentailing assurance itself, the separate deed must be executed on or before the day on which the disentailing assurance is executed, and must be enrolled at or before the time at which the disentailing assurance is enrolled (*f*).

Lunatic Protector.

Where the protector is a lunatic, the Lord Chancellor is substituted for him, and can consent as protector under the Act to any tenant in tail in remainder barring the entail (*g*).

(*c*) 3 & 4 Will. IV. c. 74, s. 32.
(*d* *Ib.* s. 41.
(*e*) Ss. 38, 74.
(*f*) Ss. 42—46.
(*g*) Ss. 33, 48.

It has been decided (in accordance with an opinion expressed by Lord St. Leonards) that, where there are both a trustee and a *cestui que trust* of the estate of freehold in possession, the *cestui que trust*, that is, the person entitled under the settlement to the beneficial enjoyment, is the protector within the meaning of the Act (*h*).

Family settlement.

The principle, both of the recovery and of the Fines and Recoveries Act, in requiring, in order to effect a complete disentail where the estate tail is in remainder, the concurrence of the person in whom the estate of freehold in possession is vested, is in conformity with the practice of settling lands which has prevailed among the landowners of England, and which has been regarded as essential to the existence of a landed aristocracy (*i*). For the purpose of preserving the succession so far as practicable in the male line, and in its eldest branch, the course of family settlement is (subject to a provision for a wife, younger sons and daughters), to limit an estate in the settled lands in the first instance to the eldest male of the family for his life, with remainder after his death to his eldest son in tail, with remainders to his second and other sons in tail in succession, with successive remainders over to other members of the family. When the eldest son of the first tenant for life attains his majority or on his marriage, the estate is re-settled, reserving to the father his original estate for life, converting the estate tail of the son into an estate for life expectant on the death of the father, with probably some rent-charge to the son during his father's life, and then on the son's death (subject to the like provision for his wife and younger sons and daughters as in the case of his father) limiting the estate again to his eldest son in tail, with remainder to his second and other sons in tail in succession. In this course of settlement the father, being in possession as tenant for life, is the protector of the settlement;

(*h*) S. 22. See *In re Dudson's Contract*, 8 Ch. Div. 628; *Re Ainslie*, 33 W. R. 179. See also *Clarke* v. *Chamberlin*, 16 Ch. Div. 176, in which trustees appointed protectors having died, the tenant for life, and not the new trustees, was held to be protector.

(*i*) This statement must be taken with considerable qualification. Before the time when the modern form of strict settlement came into use, *i.e.*, about the middle of the 17th century, the common manner of settling land was to give an estate tail to the first taker, so that ever since the invention of common recoveries he had an unrestricted power of alienation *inter vivos*. See as to the early history of settlements, Butler's note to Co. Litt. 290 b, n. I. (V.), 1 Jurid. Soc. Pap. 45; and Pollock on the Land Laws, Appendix, Note F.

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and accordingly, without his concurrence, not only can no settlement be made, but the eldest son, or whoever else may be the tenant in tail in remainder, has during his father's lifetime no power of dealing with anything more than his own estate tail, and cannot bar the remainders expectant on its termination. Under the old law this result was accomplished by requiring the concurrence of the tenant of the first estate of freehold in possession as essential to the validity of the recovery; and, on the same principle, the concurrence of the protector of the settlement is required under the statute (*k*).

The great object in this method of settlement is to tie up the land for the longest period consistent with the rules of law, namely, by giving estates to the unborn children of living persons. In an ordinary family settlement this secures inalienability (*l*), at all events, for the life of the first tenant for life, the father, and until his eldest son attains his majority: when, by the process of re-settlement, the lands are in effect made inalienable during the lives of the father and the son, and until the majority of the grandson.

An estate tail can now be barred only under the provisions of the Fines and Recoveries Act, 1833, and in conformity with the formalities it prescribes. It cannot be barred either by contract or by testamentary disposition (*m*).

Settled Land Act, 1882.

Sale—exchange.

Tenants in tail in possession and persons entitled in possession to base fees are given the powers of a tenant for life under the Settled Land Act, 1882 (*n*), and therefore can sell or exchange the lands which are the subject of the entail, which is transferred to the purchase money or the land taken in exchange (*o*). Less ample powers of sale had been conferred by the Leases and Sales of Settled Estates Act, 1856 (*p*), and the amending Acts, all of which were repealed and replaced by the Settled Estates Act, 1877 (*q*).

(*k*) See Form in 3 Dav. Prec. 1295.

(*l*) Previously to the S. L. A., 1882, a tenant for life under a settlement could not, in the absence of a power operating under the Statute of Uses, dispose of the fee. Under that Act a tenant for life as thereby defined was enabled to sell (S. L. A., 1882, ss. 3, 17, 19, 20, 22) the settled land, the purchase money being treated as land, and subject to the like estates, interests, and trusts as the land sold.

(*m*) 3 & 4 Will. IV. c. 74, s. 40. See *Bankes* v. *Small*, 36 Ch. Div. 716. So a declaration of trust by tenant in tail is inoperative to bar the estate tail: *Green* v. *Paterson*, 32 Ch. Div. 95; Wms. R. P. 104.

(*n*) 45 & 46 Vict. c. 38, s. 58 (i.).

(*o*) See *ante*, Chap. II., p. 53, *et seq.*

(*p*) 19 & 20 Vict. c. 120; see s. 15.

(*q*) 40 & 41 Vict. c. 18; see ss. 23, 24, and *ante*, Chap. II., p. 50.

We pointed out in the last chapter the restrictions which exist in the case of a tenant for life as to cutting down timber and committing other acts of waste. These do not apply to the tenant in tail, who may commit waste at his pleasure (*r*).

Leases.

A tenant in tail in possession could, under the statute 32 Hen. VIII. c. 28, make leases which were valid against his issue, though not against remaindermen or reversioners; and by the Fines and Recoveries Act, 1833, he is empowered to make leases for any term not exceeding twenty-one years to commence from the date thereof, or from any time not exceeding twelve calendar months from such date, at a rack-rent, that is, a rent of the full value of the tenement (*s*), or not less than five-sixth parts of it, without the necessity of enrolling the deed (*t*).

The statute 32 Hen. VIII. c. 28 was repealed by the Settled Estates Act of 1856 (*u*), and the same power of leasing was given to the tenant in tail in possession (*x*), except where the entail was created by Act of Parliament (*y*), as to tenants for life (*z*). This was continued by the Settled Estates Act, 1877 (*a*), which repealed and replaced the Act of 1856, and amending Acts. And ampler powers of leasing have been conferred by the Settled Land Act, 1882 (*b*), which provides that a tenant in tail in possession shall have the powers of a tenant for life under that Act, and also that a person entitled in possession to a base fee, although the reversion is in the Crown, shall have the like powers. Therefore provisions in respect of leasing, as well as of sale and exchange, by tenants in tail may in general be omitted in the instrument of settlement (*c*).

(*r*) 2 Bl. 115.

(*s*) As to rack-rent, see 2 Bl. 43; Stroud, Jud. Dict. 644; *ante*, p. 40, note (*x*). There is a definition of rack-rent in the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 4.

(*t*) 3 & 4 Will. IV. c. 74, s. 41.

(*u*) 19 & 20 Vict. c. 120, s. 35.

(*x*) *Ib.* s. 32.

(*y*) 19 & 20 Vict. c. 120, s. 42, re-enacted in 40 & 41 Vict. c. 18, s. 55; but see 45 & 46 Vict. c. 38, s. 58 (1) (i.).

(*z*) See *ante*, Chap. II., p. 50, *et seq.*

(*a*) 40 & 41 Vict. c. 18, ss. 23, 46, and 55.

(*b*) 45 & 46 Vict. c. 38, s. 58 (1) (i.) (iii.). The provision in (1) (iii.) expressly includes "a tenant in tail who is by Act of Parliament restrained from barring or defeating his estate tail, and although the reversion is in the Crown;" but it does not include a tenant in tail "where the land was purchased with money provided by Parliament in consideration of public services."

(*c*) See *ante*, Chap. II., p. 52, *et seq.* The case of the tenant for life or person having the powers of tenant for life being an infant is provided for by s. 60.

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Debts.

Formerly lands held for an estate tail were not liable to the debts of the deceased tenant in tail, except debts due to the Crown (*d*); for, though a tenant in tail has a larger estate than a tenant for life, as he has the inheritance in him, and may, when he pleases, turn it into a fee simple, yet, if he do not bar the entail, at the instant of his death he has, in effect, only an interest for his life (*e*). Under a statute, however, of the present reign (*f*), judgment debts were made binding on the lands, not only as against the issue in tail of the debtor, but against all other persons whom he might without the assent of any other person cut off and debar from any remainder, reversion, or other interest. A later Act, however, provided that a judgment should not affect any land until it had been actually delivered in execution by virtue of a writ of *elegit* or other lawful authority (*g*).

Bankruptcy

On the bankruptcy of a tenant in tail the estate tail may be barred by the trustee in bankruptcy, and the property disposed of for the same estate as that which, under the Fines and Recoveries Act, 1833, the tenant in tail might himself have acquired; and the provisions of that Act relating to the lands of a bankrupt are applied to proceedings in bankruptcy under the Bankruptcy Act, 1883 (*h*).

Estates *pur autre vie.*

Quasi-entail

The general character of an estate *pur autre vie* was described in the last chapter. Should an estate of this description, instead of being limited to "A. and his heirs" generally, or to A. and his executors or administrators, be limited to A. and "the heirs of his body," he would take what is called a *quasi*-estate tail in it; that is, an estate in the nature of an estate tail; and that estate, unless the entail should be barred, would descend during its continuance in the same manner as an ordinary estate tail.

But the tenant in possession of such an estate may bar his issue and the remaindermen by any ordinary deed of conveyance, and without the enrolment prescribed by the Fines and Recoveries Act, 1833. If, however, the estate be in remainder expectant

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(*d*) 33 Hen. VIII. c. 39.

(*e*) *Per* Ld. Hardwicke, *Paggot* v. *Gee*, 9 Mod. 482.

(*f*) 1 & 2 Vict. c. 110. See ss. 11, 13, 18, 19.

(*g*) 27 & 28 Vict. c. 112, s. 1; see *post*, Ch. XIV.

(*h*) 46 & 47 Vict. c. 52, s. 56 (5), applying 3 & 4 Will. IV. c. 74, ss. 56—73.

on an estate for life, the concurrence of the tenant for life is necessary to enable the tenant in tail to defeat the subsequent remainders (*i*).

Personalty settled on trusts similar to estates of freehold.

As stated in a previous chapter (*k*), there cannot be an "estate," properly so called, in personal property, and therefore there cannot be an estate tail in such property; a conveyance of personal property of any kind to A. and the heirs of his body, will simply vest in him the absolute interest in the property conveyed. If personalty be settled on trusts to correspond with the uses of freeholds settled to the use of A. for life with remainder after his death to his eldest son in tail, with remainders over, it will vest absolutely in the first tenant in tail of the freeholds immediately upon his birth, and the addition of the words "so far as the rules of law and equity will permit," would make no difference in this respect (*l*).

Where it is desired that leaseholds and chattels (as plate, furniture, or pictures to be held as heirlooms (*m*)), should be settled in the same manner as freeholds limited in "strict settlement," as the kind of settlement to which we have alluded is called (*n*), this may be effected to a certain extent by inserting an express provision that they are to be held on trusts to correspond with the uses of the freeholds, but so that they shall not vest absolutely in any tenant in tail *by purchase* (*o*) until he attains twenty-one, and in case of his death under that age shall go as if they had been freeholds of inheritance included in the settlement (*p*). Leaseholds and chattels are sometimes (*q*), in order to insure their devolution in all events with the freeholds,

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(*i*) *Edwards* v. *Champion*, 3 De G. M. & G. 202. See these *quasi*-estates tail discussed in *Allen* v. *Allen*, 2 Dr. & War. 307, by Sir E. Sugden, L.C. of Ireland.

(*k*) Chap. II., p. 30. Elph. N. & C. Interp. 260.

(*l*) 3 Dav. Prec. i. 600.

(*m*) See *ante*, p. 11.

(*n*) *Ante*, p. 75. See, as to the objects and form of strict settlements, Elph. Introd., pp. 359, *et seq.*; Stud. Prec. 85.

(*o*) *Post*, p. 144. "The effect of the words 'by purchase' in such a limitation is to prevent the application of the rule against perpetuities; for, if the limitation were to tenants in tail taking *by descent* as well as by purchase, there might be a series of such tenants in tail taking by descent who might die under age, and the vesting might be protracted indefinitely:" Watson's Compendium of Equity, vol. i., p. 248. See *Christie* v. *Gosling*, L. R. 1 H. L. 279.

(*p*) 3 Dav. Prec. i. 602, 627; and see *Miles* v. *Harford*, 12 Ch. Div. 691. For forms see, as to leaseholds, 3 Dav. Prec. ii. 1130, and 4 Dav. Prec. 435; as to chattels, 3 Dav. Prec. ii. 1117, 1132, 1180, and 1224, and 4 Dav. Prec. 438. The leading case on this subject is *Ld. Scarsdale* v. *Curzon*, 1 J. & H. 40.

(*q*) 4 Dav. Prec. 436, note (*k*).

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settled by means of a trust for sale, and for reinvestment in the purchase of freeholds, to be settled to the same uses as the devised freeholds, with a power to postpone the sale, and a direction that the rents and enjoyment until sale shall belong to the persons who would be entitled to the rents of the substituted freeholds (*r*).

Settlement of realty by trust for sale.

In the case of real property, where it is not wished to make a "strict settlement," but that the children should take equally, recourse is had to a trust for sale, whereby the real property is constructively converted into personalty. The mode and scope of such settlement are thus shortly described by Mr. Prideaux:—

> "Where it is desired to settle land so that the children shall take equally, the proper mode of attaining that object is by conveying it to trustees in trust for sale, either at once, or after limitations to the husband and wife successively for life, and then settling the proceeds as personal estate, with a proviso that until sale, the rents and profits shall be paid and applied in the same manner as the income of the proceeds would be applicable if a sale had been made" (*s*).

Real property thus settled by way of trust for sale is "settled land" within the meaning of the Settled Land Act, 1882, and the person (or persons) for the time being beneficially entitled to the income of the land till sale is the tenant for life, and the provisions of the Act are made generally to apply as in the case of a strict settlement (*t*). But under the Settled Land Act, 1884, the tenant for life, before exercising the powers conferred by the Act of 1882, must obtain the leave of the Court, and the order giving leave is to be registered as a *lis pendens* (*u*). In the absence of such order, the trustees of the settlement or other person thereby authorized may sell and execute any of the trusts or powers (*x*) created by it without any consent not required by the settlement (*y*).

(*r*) See S. L. A., 1882 (45 & 46 Vict. c. 38), s. 37.

(*s*) 2 Prid. 263; see as to settlements of this kind, 4 Dav. Prec. 7; Stud. Prec., Form XXXIX.; and Elph. Introd. 306.

(*t*) 45 & 46 Vict. c. 38, s. 63; and see s. 58 (1) (ix.).

(*u*) 47 & 48 Vict. c. 18, s. 7, *post*, p. 108.

(*x*) That is, trusts or powers contained in a settlement by way of *trust* for sale (within s. 63 of the S. L. A., 1882), but in the case of a settlement of the land itself, not by way of trust for sale, the consent of the tenant for life is necessary to the exercise of powers by the trustees: S. L. Act, 1882, s. 56; or of one of several concurrent tenants for life: S. L. A., 1884, s. 6 (2).

(*y*) 47 & 48 Vict. c. 18, s. 6 (1). See as to the effect of ss. 6 & 7 of the Act, *Re Harding's Estate*, [1891] 1 Ch. 60.

CHAPTER IV.

ESTATES IN FEE SIMPLE.

Distinction between estates for life, estates in tail, estates in fee.

We have now to consider another of the classes into which, in point of quantity (that is, continuance or duration), estates of freehold are divided, namely, estates in "fee simple."

The duration of a life estate is, of course, measured by that of the life or lives for which the land is holden. An estate tail is so far of the nature of an estate for life that, unless, under the provisions of the Fines and Recoveries Act, 1833, described in the last chapter, it is converted into a larger estate of a different character, the rights of the owner in the land cease on his death. He cannot devise it by his will; and, although it devolves on persons deriving their right of succession from their descent from the original donee in tail, it goes to the particular class of heirs indicated by the original grant; and therefore their title is to be ascribed not to their representing their ancestor, but to their answering the description of the persons pointed out in the grant; they claim from the donor, *per formam doni* (*a*). But land held for an estate in fee simple is subject to the owner's power of disposition in his life by any of the assurances proper for the alienation of real estate, and it is applicable during his life in satisfaction of his debts; it is subject also after his death to his debts, and is devisable by his will; and, if not devised, so long as there exist any heirs, male or female (*b*), of the last "purchaser," *i.e.*, the last person entitled who acquired his title by purchase (which expression includes a devisee), that is, otherwise than by inheritance, the estate will descend to such heirs (*c*). Only in the event of the last owner dying intestate without heirs, will an estate in fee simple come to an end, and

Escheat.

(*a*) Wms. R. P. 215; *ante*, p. 65.

(*b*) See where the heirs of the purchaser fail, 22 & 23 Vict. c. 35, s. 19; *post*, p. 145.

(*c*) Where the "purchaser" is a bastard, the estate can descend only to his lineal issue, for he is in law *filius nullius*, and therefore cannot have heirs in the ascending line or collateral heirs.

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an escheat occur, *i.e.*, "the lands fall to the lord of whom they are holden" (*d*), and from whom or whose predecessor in title the estate of his tenant in fee simple was originally derived. The escheat enures to the immediate lord of the fee; but now, mesne tenure having generally disappeared (*e*), the Crown takes, in most cases, as being lord paramount of all lands in the country (*f*).

Origin of the term "fee."

The term "fee" represents the Latin *feodum*, and means the same as a fief or feud. In its origin it was used in opposition to "allodial," and indicated the feudal character of the holding; but it is used in English law to signify an estate of inheritance (*g*), and a "fee simple" is spoken of in opposition to a "fee tail." As Lord Coke says:—

> "'Simple' is added, for that it is descendible to the heirs generally, that is, simply, without restraint to the heirs of the body or the like" (*h*).

It is the greatest estate or interest which under the Law of England any subject can have in real property.

Words of inheritance—

in Deeds;

In the last chapter it was pointed out that the use of words referring both to inheritance and to procreation was, until the Conveyancing and Law of Property Act, 1881, took effect, necessary in deeds to create an estate tail (*i*). In the case of a fee simple, words of inheritance alone were requisite; that is to say, in every conveyance *inter vivos* before 1882 for an estate in fee simple, the use of the word "heirs" was necessary for the purpose of marking out, or "limiting," the estate.

(*d*) Co. Litt. 13 a.

(*e*) Because, the statute of *Quia Emptores* having forbidden sub-infeudation, which created mesne tenures, all such tenures must have had their origin before the date (A.D. 1290) of that statute, and by lapse of time they can seldom now be traced, and the immediate lord is therefore unknown. See on this statute, Digby, R. P. 232, *et seq.*, and see its text, *ib.* 234.

(*f*) As to escheat, see 3 Cruise, Dig., Tit. xxx., pp. 396, *et seq.*; Digby, R. P. 91, 422; Wms. R. P. 54; Challis, R. P., Ch. VI., p. 33; Tud. L. C. R. P. 772 (note to *A.-G.* v. *Sands*); Chitty, Prerog. 226; P. & M. Hist. i. 332. As to procedure, see the Escheat (Procedure) Act, 1887 (50 & 51 Vict. c. 53). On escheat the lord does not take the estate of the tenant, for that estate is extinguished, and "the lord resumes the possession of the land upon the determination of the grant to the tenant:" *per* Wigram, V.-C., *Doe ex dem.* v. *Morris*, 3 Hare, 394, at p. 402; *per* Lord Selborne, *A.-G. of Ontario* v. *Mercer*, 8 App. Cas. 767, at 772. As to escheat of incorporeal hereditaments and equitable estates, see the Intestates Estates Act, 1884 (47 & 48 Vict. c. 71), s. 4, and the remarks thereon in Challis, R. P. 39; *Att.-Gen.* v. *Anderson*, [1896] 2 Ch. 596, a decision on ss. 4 and 7, and *post*, p. 361.

(*g*) See Challis, R. P. 191; Wms. R. P. 19; and as to the meaning of *feodum* or "feud," see P. & M. Hist. i. 213; Maine, Early Law and Custom, Ch. X., pp. 338, *et seq.*, and 346; Digby, R. P. 32, *n.*, 60, *n.*, 72, *n.*

(*h*) Co. Litt. 1 b; and see *ante*, p. 60.

(*i*) *Ante*, p. 63.

in Wills.

In a will, however, if the intention was apparent to give an estate in fee simple, the Courts, notwithstanding the absence of words of inheritance, would construe the devise to be in fee simple, even prior to the Wills Act, 1837. The reason of this, according to Blackstone, was that wills, being often drawn up when the testator is *inops concilii*, are always more favoured in construction than formal deeds, which are presumed to be made with great caution, forethought, and advice (*k*). It was, however, presumed, unless the contrary was manifest from the context, that in the absence of words of inheritance the testator's intention was only to confer a life estate. The Wills Act, 1837 (*l*), has reversed that presumption, by enacting that, unless a contrary intention shall appear by the will, a devise of real estate shall be construed to pass the fee simple (or other the whole estate or interest which the testator had power to dispose of by will). Thus, if by deed a man conveys land, of which he is owner in fee by a limitation to A. B., as distinguished from one to A. B. "and his heirs," A. B. takes only for life and that notwithstanding the gift be to A. B. "for ever," or to him "and his assigns for ever" (*m*). Under a gift by will to A. B. simply, previously to the Wills Act, 1837, A. B. would have taken only for life, unless he could satisfy the Court from the context of the will that it was the testator's intention to confer on him an estate in fee; as, where the devise was to A. B. "in fee simple," or to him "for ever," or to him "and his assigns for ever"; or the devise was of the testator's "estate," or "estates," or of his "property," or of his "inheritance" (*n*). But in cases within the Wills Act, 1837, A. B. would be presumed to take an estate in fee, unless it could be established to the satisfaction of the Court, from the context, that he was not to take such an estate—in other words, unless the presumption could be rebutted.

Wills Act, 1837.

Corporations (*o*).

A corporation, whether sole or aggregate, can have no heirs. A gift to a corporation sole and his "successors" confers a fee simple, but without the word "successors" it confers an estate

(*k*) 2 Bl. 172.

(*l*) 7 Will. IV. & 1 Vict. c. 26, s. 28. *Post*, Ch. XV.

(*m*) 2 Bl. 107. "'Assigns' is not a word of limitation; it only means to shew that the man takes an assignable estate:" *per* Jessel, M.R.; *Osborne* to *Rowlett*, 13 Ch. Div. 777. For some exceptional cases, where the fee passes without the word "heirs," see Elph. N. & C. Interp. 226.

(*n*) 2 Jarman on Wills, 4th Ed., 274; *Hill* v. *Brown*, [1894] A. C. 125.

(*o*) *Post*, p. 88.

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for his life only. A gift to a corporation aggregate where all can take, *i.e.*, where all the individual members are in law capable, passes the fee without any words of limitation; but, if one only of the corporation can take (*p*), the use of the word "successors" is necessary (*q*).

Now under the Conveyancing and Law of Property Act, 1881, in deeds executed after the 31st December, 1881, it is sufficient in the limitation of an estate in fee simple, to use the words "in fee simple" without the word "heirs" (*r*). Presumably this enactment does not enable an estate in fee simple to be limited to a corporation sole without the use of the word "successors."

Estates in fee simple have been divided into three classes—(1) absolute; (2) qualified or base; and (3) conditional (*s*).

1. Fee simple absolute.

A "fee simple absolute" is the ordinary estate limited to a man and his heirs, without qualification, and is understood to be intended by the term "fee simple," without more.

2. Qualified, or base fee.

A "qualified" or "base fee" is where, by the terms of the limitation, the duration of the estate is restricted by a qualification. But, so long as the estate continues, the owner has all the rights of an ordinary tenant in fee simple. The nature of a qualified or base fee will be best understood by illustration. A grant to A. and his heirs, tenants of the Manor of Dale (*t*), is a base fee. It is not an absolute fee, because it has the qualification attached to it that there shall be a concurrent tenancy of the Manor of Dale. When the concurrent tenancy of the Manor comes to an end, the estate granted to A. and his heirs also comes to an end. But so long as the concurrent tenancy continues, A. and his heirs or assigns have all the rights of an ordinary tenant in fee simple.

We have seen in the last chapter an instance of a base fee, in the case of a tenant in tail in remainder, who, by a disentail without the protector's consent, acquires or disposes of a fee

(*p*) See Co. Litt. 94 b; *e.g.*, in the case of an abbot or prior, and convent, whose members were dead in law and whose head only could take.

(*q*) See Elph. N. & C. Interp. 226, as to limitations to corporations. Owing to the use of the word "successors" in the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), it is the practice in limitations of the fee simple to corporations aggregate to employ the word "successors."

(*r*) 44 & 45 Vict. c. 41, s. 51, and see 3rd form in 4th sched. See *ante*, p. 63.

(*s*) Co. Litt. 1 b; 2 Bl. 109; Challis, R. P. 50.

(*t*) Co. Litt. 27 a.

simple limited to the period during which the estate tail would have lasted if there had been no disentail; that is, during the existence of the donee's issue of the prescribed class (*u*).

Lord Coke says:—

Parson.

"A parson or vicar, for the benefit of the Church and of his successor, is in some cases esteemed in law to have a fee simple qualified; but to do anything to the prejudice of his successor, in many cases the law adjudgeth him to have in effect but an estate for life" (*x*).

3. Conditional fee.

"A conditional fee at the Common law," says Blackstone (*y*), "was a fee restrained to some particular heirs, exclusive of others. . . . It was called a conditional fee, by reason of the condition expressed or implied in the donation of it—that is, if the donee died without such particular heirs, the land should revert to the donor."

A conditional fee was, at Common law, created by a gift to A. and the heirs of his body, which estate (as we have seen) was converted by the Statute *De Donis Conditionalibus* into an estate tail (*z*).

Alienability.

Every estate in fee simple is, under the existing law, subject to alienation by its owner in his lifetime; or to the operation of his testamentary disposition after his death; and this is so as to the entire estate. The alienation must be effected by such assurances (*i.e.*, forms of conveyance) as are recognized by the law, and the disposition itself must not contravene any rule of law. It may be an alienation of the whole fee simple estate, or it may take the form of a grant of any smaller estate.

The consideration of the nature and operation of these assurances is reserved for a later chapter (*a*), but it may be here stated that in the case of an alienation during the lifetime of the owner —one, as it is termed, "*inter vivos*"—the prescribed assurance is a deed. The beneficial or equitable interest may indeed be effectually conveyed by a writing not under seal, but for the legal transfer of the estate itself a document sealed and delivered, in other words a deed, is required.

Inter vivos. By deed.

Formerly at Common law, the conveyance of an estate in possession was by livery of seisin, which was generally accompanied by a charter of feoffment. The estate, however, passed

(*u*) *Ante*, p. 74. See also in the case of a fine, p. 71.

(*x*) Co. Litt. 341 a. See *per* M.R. in *Mulliner* v. *Midland Rail. Co.*, 11 Ch. Div. 622. See farther as to the nature of a parson's estate, Co. Litt. 8 b, 9 b, 94 b, 95 a, 98 a, 99 a, 250 a, 340 b, 341 a, 342 b, 343 a.

(*y*) Vol. ii. 110.

(*z*) *Ante*, p. 65.

(*a*) Chap. XIV.

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by the livery alone, and no written instrument was required until it was by the Statute of Frauds (*b*) made necessary that the conveyance should be evidenced by writing signed by the party, or his agent by writing lawfully authorized. Estates in expectancy (that is, remainders and reversions) and other incorporeal hereditaments were transferred by deed of grant, and they were said to "lie in grant," but estates in possession in corporeal hereditaments to "lie in livery" (*c*). But by the Real Property Act, 1845 (*d*), it is enacted that after the 1st October, 1845, all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold (*e*), be deemed to lie in grant as well as in livery; and that a feoffment made after that date (other than a feoffment made under a custom by an infant) (*f*) shall be void at law unless evidenced by deed: so that a simple deed of grant became the ordinary form of conveyance of estates, whether in possession or in expectancy, in freehold lands.

Grant."

Since the coming into operation of the above Act, it has become the practice to use the word "grant" in conveyances of freehold land. By the Conveyancing and Law of Property Act, 1881, it is declared that in conveyances, whether before or after the Act, the use of the word "grant" is not necessary in order to convey tenements and hereditaments, corporeal or incorporeal (*g*). Certain short forms of conveyance were authorized by 8 & 9 Vict. c. 119, but these did not commend themselves to the profession, and were not adopted. The Lands Clauses Consolidation Act, 1845 (*h*) contains a statutory form of conveyance, which, though optional, has a special efficacy (*i*) for use in cases of purchases under that Act, which contains provisions as to the taking of lands for undertakings of a public nature.

Registry Acts —Middlesex and Yorkshire.

Further, if the property be situate in the county of Middlesex (*k*) (exclusive of the City of London), or the North, East, or West Ridings of Yorkshire, or in the town and county of

(*b*) 29 Car. II. c. iii. s. 1. See *post*, Ch. XIV.

(*c*) *Ante*, p. 13, note (*q*).

(*d*) 8 & 9 Vict. c. 106, ss. 2 and 3. See the observations on this Act prefixed to Dav. Conc. Prec.

(*e*) *I.e.*, the present estate in possession.

(*f*) Such a feoffment must be evidenced by a deed or writing signed by the infant (2 Dav. Prec. i. 245). See *Re Maskell and Goldfinch*, [1895] 2 Ch. 525.

(*g*) 44 & 45 Vict. c. 41, s. 49.

(*h*) 8 & 9 Vict. c. 18, s. 81.

(*i*) Dart, V. & P. 575.

(*k*) *I.e.*, within the limits of the county before they were altered by the Local Government Act, 1888 (51 & 52 Vict. c. 41). See ss. 40 and 96.

Kingston-upon-Hull, the Middlesex Registry Act, 1708 (*l*) and the Yorkshire Registry Acts (*m*) respectively require that a memorial of the conveyance, *i.e.*, a concise statement of the effect of the deed in the prescribed form, shall be registered as soon as practicable after execution (*n*).

A short statutory form of deed was provided by the Legislature in 1862, by the Land Registry Act, 1862, which might be used for the transfer of lands the title to which had been registered under the provisions of the Act (*o*). This Act was superseded by the Land Transfer Act, 1875 (*p*), under which the registration of title by the proprietor is, as under the former Act, optional; but, if registered, the lands may be transferred in manner to be prescribed by rules under the Act (*q*), and the transfer is to be completed by the registrar entering on the register the transferee as proprietor of the land transferred.

Will.

In the case of a disposition to take effect only on the death of the owner, the assurance is by an instrument called a "Will," for which statute law has prescribed (as will be seen later) an execution in accordance with certain forms, and a certain number of witnesses (*r*).

The Statute of *Quia Emptores* (*s*), it will be observed, merely conferred a power of alienation *inter vivos*. The power of testamentary disposition of lands had existed before the Conquest, but afterwards, except in a few places where local custom excluded the Common law, it did not exist until late in the reign of Henry VIII., so far as regards the legal estate in lands. Where, however, a person had conveyed his land to be holden for such uses as he should declare by will, he could dispose by will of the equitable interest in it (*t*).

(*l*) 7 Anne, c. 20. The registration is now in the Land Registry Office; see 54 & 55 Vict. c. 64, and Rules in W. N. February 13th, 1892.

(*m*) See the Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54, amended by 48 Vict. c. 4, and 48 & 49 Vict. c. 26), repealing and replacing the former Acts, viz., 2 & 3 Anne, c. 4; 6 Anne, c. 20 (W. Riding); 6 Anne, c. 62 (E. Riding and Kingston-upon-Hull); 8 Geo. II. c. 6 (N. Riding).

(*n*) See, as to the Registry Acts, Elph. & Cl. on Searches, 125, *et seq.*; Wms. R. P. 203; Dart, V. & P. 958.

(*o*) 25 & 26 Vict. c. 53.

(*p*) 38 & 39 Vict. c. 87.

(*q*) Ss. 111, 29, 4.

(*r*) See *post*, Ch. XV.

(*s*) 18 Ed. I. c. 1; discussed Wms. R. P., Ch. III., p. 39. See its text in Digby, R. P. 234.

(*t*) See Wms. R. P. 72; Digby, R. P. 375, *et seq.*; Co. Litt. 111 a, and Hargrave's note at 111 b; *post*, Ch. XV.

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Alienation not to contravene public policy.

One of the restrictions to which the power of alienation is subject is that the disposition of the property must not be of a character contravening public policy, that is, tending to produce results which are regarded as injurious to the welfare of the State or its citizens. On this subject Jessel, M.R., said in the case of *Besant* v. *Wood* (*u*) :—

"Public Policy."

"You cannot lay down any definition of the term 'public policy,' or say it comprises such and such a proposition, and does not comprise such and such another; that must be, to a great extent, a matter of individual opinion, because what one man, or one judge, and perhaps I ought to say one woman also, might think against public policy, another might think altogether excellent public policy. Consequently, it is impossible to say what the opinion of a man or a judge might be as to what public policy is."

And he applied these remarks to the case of agreements between husband and wife to live separate.

Mortmain.

A prominent instance, dating from a very early period of the history of English law, of the rule, that the alienation must not be contrary to public policy, is the prohibition of such alienation as would lock up land in the hands of some body having a perpetual existence (*x*). In the old Norman-French, the language of our ancient law, this was termed (as we have seen) putting the land into "mortmain," or "dead hand" (*y*). Bodies of the character here referred to are what are called "corporations," or bodies corporate; and these are "ecclesiastical" or "lay,"

Corporations —ecclesiastical, lay— aggregate, sole.

(*u*) 12 Ch. Div. 620. See *per* Lord Bramwell, in *Mogul Steamship Co.* v. *McGregor, Gow, & Co.*, [1892] A. C. 25, at p. 45.

(*x*) It is interesting to see the extreme anger with which the Elizabethan lawyers regarded the early attempts at making settlements of such a nature that the land could not be alienated by the first taker. For instance, in *Mary Portington's Case* (10 Rep. 35 b), it was decided that a tenant in tail cannot be restrained by any condition or limitation from suffering a common recovery. Coke comments on this case in the words following (see Preface to 10 Rep., p. 2): "Then I have published in *Mary Portington's Case*, for the general good both of prince and country, the honourable funeral of fond and new found perpetuities, a monstrous brood carved out of mere invention, and never known to the ancient sages of the law; I say monstrous, for that the naturalist saith '*Quod monstra generantur propter corruptionem alicujus principii*:' and yet I say honourable, for that these vermin have crept into many honourable families, at whose solemn funeral I was present, and accompanied the dead to the grave of oblivion but mourned not, for that the commonwealth rejoiced that fettered freeholds and inheritances were set at liberty, and many and manifold inconveniences to the head and all the members of the commonwealth thereby avoided."

(*y*) "*Ad manum mortuam*" are the words of the statute *De Viris Religiosis* (7 Ed. I., stat. 2, c. 13). See Digby, R. P. 215, 216:—"Lands were said to come into a 'dead hand' when they were held not by an individual tenant, but by a corporation or body. This expression was probably first applied to the holding of

"aggregate" or "sole;" their distinguishing characteristic being their existence or succession in perpetuity. Corporations exist by virtue of a charter of incorporation by the Crown, or by prescription, or by Act of Parliament (*z*). Their nature will be best understood by illustrations. A very early form of such a body was a monastery—a body of persons associated together in common brotherhood, and acquiring common property for the purposes of religion; the establishment of a religious house consisting of a brotherhood of monks or priests with a priest for their head: vacancies occurring in their body, as by death, might be from time to time filled up, so as to keep up a perpetual existence. Monasteries were dissolved in England *temp.* Hen. VIII., but a cathedral or church may have a body of clergy attached to it called canons, whose head is termed a dean, and such a body may hold lands devoted to the keeping up of the church, the performance of its religious services, and the maintenance of the priests; vacancies in the body being filled up as they from time to time arise. These are called "ecclesiastical corporations." A "lay corporation" exists, for instance, where a grant has been made by the Crown conferring the government of some particular town or city upon some special body of its inhabitants, as, for instance, on a mayor, aldermen, and burgesses; or where a charter of incorporation has been granted to some community of individuals associated together for purposes of commerce and profit, with a governing body or directors for the management of its affairs, and with provisions, as vacancies occur, for recruiting the number of members and preserving the society. As examples of the former class, the corporations of London, Bristol, &c., may be cited—of the latter, the East India Company and other old trading companies. A college in a university, and the university itself, are other examples. The corporation is regarded as a person distinct from the members, or corporators, as they are sometimes called, for the time being (*a*).

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lands by religious bodies or persons who, being 'professed,' were reckoned dead persons in law. It then came to be applied to the holding of lands by corporations as opposed to individuals, whether the corporations were ecclesiastical or lay, sole or aggregate." The words in 15 Rich. II. c. 5 (Digby, R. P. 331) are "*a mort mayn.*"

(*z*) 1 Bl. 469, *et seq.*; Chitty Prerog. 121; Grant on Corporations, 6; P. & M. Hist. i. 469, *et seq.*

(*a*) See M. L. P. P. 289.

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The corporations instanced—whether ecclesiastical or lay—are "corporations aggregate." A "corporation sole" consists of one person only, and his successors—for instance, the King, a bishop, a parson, or vicar; the office of each of the latter, instead of ceasing on his death or withdrawal, is filled up by the appointment of a successor and is thus perpetual.

Now, it is obvious that to vest lands in a corporation, a perpetual body, would be to deprive the lord of many of the benefits to be derived from them when held by ordinary tenants —namely, his wardships, reliefs, escheats, and other incidents of his seignory, which arose by reason of the death or felony or failure of heirs of the tenant. But tenants were easily prevailed on by the ecclesiastics to make grants of land to the Church for what they termed "pious uses," and, within two centuries of the Norman Conquest, a very large portion of the lands of the country had been acquired by ecclesiastical corporations.

Statutes of Mortmain.

The power of the lords procured the enactment of a series of Statutes, called Statutes of Mortmain, addressed to the remedy of these grievances. The first legislative enactment against such alienations was contained in *Magna Charta*, 9 Hen. III. c. 36 (*b*), and was directed only against gifts (*i.e.*, of the fee simple) to "religious houses," and made such gifts void and a cause of forfeiture to the lord of the fee. The attempted evasion of this statute on the part of the ecclesiastics by taking long leases for years, led to the Statute *de Viris Religiosis* (*c*), which provided that no person, religious or other whatsoever, should buy or sell, or receive under pretence of a gift or a term of years or any other title whatsoever, or should by any art or device appropriate to himself, any lands or tenements whereby the same should come into mortmain; upon pain that the immediate lord of the fee, or, on his default for one year, the next lords paramount successively, and, in default of all of them, the king, might enter thereon as upon a forfeiture. The ecclesiastics, backed by the astuteness of the lawyers, long struggled to evade the enactments against the alienation of land in mortmain. Their first expedient was

(*b*) 2 Inst. 74; see the clause in Digby, R. P. p. 132.

(*c*) 7 Ed. I. st. 2. See this statute in Digby, R. P. 217.

the collusive action, known as a recovery, which we have above explained (*d*). This was held (*e*) not to be within the Statute *de Viris Religiosis*; but it was defeated by the Statute of Westminster the Second (*f*). They then resorted to the device of a conveyance, not to themselves directly, but to a feoffee to the use of the religious house, they then taking the profits while the feoffee had the seisin or legal possession; for the Court of Chancery (then under the direction of the clergy) held the feoffee bound to account for the profits to the *cestui que use* (*g*). This device was defeated by 15 Rich. II. c. 5, in which statute the doctrine of mortmain is applied to certain lay corporations, viz., guilds or fraternities, and mayors, bailiffs, and commons of cities, boroughs, and other towns (*h*).

Licence from the Crown.

And now no lands can be held by a corporation except by licence from the Crown, or under special statutory powers (*i*). The power of the Crown to grant such licences is said to have existed even before the Norman Conquest (*k*). However that may have been, a power to grant licences to hold lands, notwithstanding the Statutes of Mortmain, has always been exercised by the Crown.

Under the Statutes of Mortmain an alienation in mortmain gave a right to the mesne lords, or on their default (*l*) the king, to enter upon and seize the land; but, if such right was waived, the alienation was good. When a tenant could not alien without the consent of his lord, the licence must have been from the immediate lord, the mediate lords (if any), and the king (*m*), but a licence from the Crown alone is now sufficient (*n*). A mode of applying for licence from the king was prescribed (*o*). The pretended power of the Crown to supersede or dispense with laws, or the execution of laws, without consent of Parliament, having been declared illegal by the Bill of Rights, 1 Will. & Mary, sess. 2, c. 2, it was thought

The Bill of Rights.

(*d*) *Ante*, p. 66.

(*e*) Digby, R. P. 216.

(*f*) 13 Ed. I. c. 32; Digby, R. P. 216, 219; 2 Inst. 428.

(*g*) 2 Bl. 271.

(*h*) See this statute in Digby, R. P. 331. See as to superstitious uses, *post*, p. 98.

(*i*) The Mortmain and Charitable Uses Act, 1888, 51 & 52 Vict. c. 42, ss. 1 and 2 (which repeals the Statute De Viris Religiosis and the Statute 15 Rich. II. c. 5). On the history of the law as to mortmain, see Tudor, Charit. Trusts, pp. 371, *et seq.*

(*k*) Shelford, Mortm., 35. As to the early history of licences to hold in mortmain, see Tudor, Charit. Trusts, 375.

(*l*) Co. Litt. 2 b.

(*m*) Shelford, Mortm. 35.

(*n*) 51 & 52 Vict. c. 42, ss. 1, 2.

(*o*) 27 Ed. I. st. 2.

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prudent to confirm by Act of Parliament the king's power of granting licences in mortmain; and accordingly it was provided by 7 & 8 Will. III. c. 37 (repealed and re-enacted by 51 & 52 Vict. c. 42), that the Crown at its discretion might grant licences to alien or take lands in mortmain, and that when such licence had been given the lands should not be subject to forfeiture by reason of the alienation (*p*). In the absence of a licence or of a statute authorizing land to be held by a corporation, any land assured to it is forfeited to the Crown or a mesne lord (*q*).

Charters of incorporation usually contain a clause declaring that the intended corporation shall have power (notwithstanding the Statutes of Mortmain) to purchase, hold, and enjoy to them and their successors any lands, tenements, and hereditaments whatsoever (to a specified value), without incurring the penalties or forfeitures of the Statutes of Mortmain or any of them (*r*).

Power of charities to purchase land, &c.

By the Charitable Trusts Amendment Act, 1855 (*s*), it is provided that any incorporated charity, or the trustees of any charity, whether incorporated or not, may, with the consent of the Charity Commissioners, invest money arising from any sale of land belonging to the charity, or received by way of equality of exchange or partition, in the purchase of land, and may hold such land without any licence in mortmain (*t*). By the Charitable Trusts Act, 1853 (*u*), and subsequent statutes (*x*), all endowed charities, including schools, are placed under the control of the Charity Commissioners; and to facilitate the incorporation of trustees of charities established for religious, educational, literary, scientific, or public charitable purposes, power has been given by the Charitable Trustees Incorporation Act, 1872 (*y*), to the Commissioners, on the application of the trustees of any such charities, to grant to them a certificate of registration as a corporate body (*z*).

Charity Commissioners.

(*p*) Shelford, Mortm. 39.

(*q*) 51 & 52 Vict. c. 42, s. 1.

(*r*) Shelford, Mortm. 40.

(*s*) 18 & 19 Vict. c. 124, s. 35.

(*t*) See also 33 & 34 Vict. c. 34, which allows "all corporations or trustees holding moneys in trust for any public or charitable purpose," to invest such moneys on mortgage of land; but, on foreclosure, the land must be sold.

(*u*) 16 & 17 Vict. c. 137.

(*x*) Namely, 18 & 19 Vict. c. 124; 23 & 24 Vict. c. 136; 25 & 26 Vict. c. 112; 32 & 33 Vict. c. 110 (see s. 12, empowering majority of trustees to deal with property of the charity); 37 & 38 Vict. c. 87; 50 & 51 Vict. c. 49. For a concise account of these Acts, see Tudor, Charit. Trusts, pp. 449, *et seq.*

(*y*) 35 & 36 Vict. c. 24.

(*z*) Provision has also been made for vesting lands held in trust for a charity in

Joint Stock Companies.

Statutory power has also been given to joint stock companies registered under the Companies Act, 1862, to hold lands (*a*); and no limit is imposed, except by a section (*b*) which enacts that:—

> "No company formed for the purpose of promoting art, science, religion, charity, or any other like object, not involving the acquisition of gain by the company or by the individual members thereof, shall, without the sanction of the Board of Trade, hold more than two acres of land."

Similarly by the Public Health Act, 1875 (*c*), urban and rural sanitary authorities, by the Local Government Act, 1888 (*d*), County Councils, and by the Local Government Act, 1894 (*e*), Parish Councils, are empowered to purchase and hold lands for the purposes of such Acts. Further exemptions in favour of public parks, school houses, and museums, are contained in the Mortmain and Charitable Uses Act, 1888 (*f*).

Mortmain Act. 9 Geo. II. c. 36: Charitable Uses.

The principle of the ancient statutes against alienation in mortmain has been extended in more modern times to a mischief of somewhat analogous, though not identical, character. A statute of the reign of George II. (*g*), commonly, though improperly, called "The Mortmain Act" (*h*), based as it recites on the impolicy of allowing gifts, under the name of charity, to be made by persons in view of approaching death, to the disherison of their lawful heirs, prohibited, except in the case of the Universities of Oxford and Cambridge, and their colleges, and the colleges of Eton, Winchester, and Westminster, any alienation of lands or hereditaments for charitable purposes (*i*), otherwise than by deed indented, sealed, and delivered in the presence of two or more witnesses, twelve months at least before the death of the donor, and enrolled in Chancery within six months after its execution (*k*). It also required that the deed

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an official trustee; see the 16 & 17 Vict. c. 137, ss. 47, 48; 18 & 19 Vict. c. 124, s. 15: 50 & 51 Vict. c. 49, s. 5.

(*a*) See 25 & 26 Vict. c. 89 (The Companies Act, 1862), ss. 18 and 19.

(*b*) 25 & 26 Vict. c. 89, s. 21.

(*c*) 38 & 39 Vict. c. 55, ss. 7, 164, 175, &c. These authorities are now in most cases called District Councils: Local Government Act, 1894 (56 & 57 Vict. c. 73).

(*d*) 51 & 52 Vict. c. 41, s. 79.

(*e*) 56 & 57 Vict. c. 73, s. 8.

(*f*) 51 & 52 Vict. c. 42. See also *post*, p. 100.

(*g*) The Charitable Uses Act, 1735 (9 Geo. II. c. 36) (repealed by the Mortmain and Charitable Uses Act, 1888, 51 & 52 Vict. c. 42). See *Corbyn* v. *French*, Tudor's L. C. R. P. 519; *Luckraft* v. *Pridham*, 6 Ch. Div. 205; and 4 Dav. Prec. 129, 312.

(*h*) Shelford, Mortm. 21.

(*i*) See as to meaning p. 98.

(*k*) The Act contains corresponding provisions with respect to money, stock, or other personal estate to be laid out in the purchase of lands.

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should take effect in possession immediately from the making thereof (*l*), and should be without power of revocation, or any reservation, trust, condition, limitation, clause, or agreement, for the benefit of the grantor or persons claiming under him. The Act, however, contained a saving clause as regards conveyances for value, when the purchase was made really and *bonâ fide* for a full and valuable consideration, actually paid at or before the making of such conveyance. In such cases, it was not required that the deed should be executed at least twelve months before the death of the grantor (*m*); but even in these cases the enrolment and other formalities prescribed by the Act were necessary (*n*). By 24 Vict. c. 9, the necessity of the deed being indented was abolished; reservations of a nominal rent, or of minerals, or easements, were permitted, and also covenants as to buildings, &c., and other specified provisions for the benefit of the grantor; and the necessity of enrolling the deed of conveyance was dispensed with where the charitable purposes were disclosed by a separate deed, provided such separate deed was enrolled in Chancery within six months of the perfecting of the deed of conveyance. By 27 & 28 Vict. c. 13, s. 4, it was provided that the "full and valuable consideration," mentioned in 9 Geo. II. c. 36, might consist wholly or in part of a rent reserved. And by the Rules of the Supreme Court the enrolment is to be in the Central Office (*o*).

By various Acts of Parliament (*p*) want of enrolment within the time prescribed by the 9 Geo. II. c. 36, was allowed to be supplied within certain limited periods specified in the Acts; but these provisions were retrospective only. Under general enactments (*q*), applicable to future as well as past transactions, enrolment after the time prescribed by the 9 Geo. II. c. 36, was allowed in cases where the original conveyances or other

(*l*) By 26 & 27 Vict. c. 106, leases (made before the Act) for charitable uses are, *for the purposes of certain recited Acts*, to be good if they took effect in possession within one year from their date. The recited Acts are now repealed. See *post*, note (*p*).

(*m*) 9 Geo. II. c. 36, s. 2.

(*n*) See 9 Geo. IV. c. 85, correcting a misapprehension which had arisen on this point, but making past conveyances valid, notwithstanding the formalities had not been observed.

(*o*) See Rules of the Supreme Court, Ord. LXI. r. 9.

(*p*) 24 Vict. c. 9 (ss. 3, 4); 25 Vict. c. 17; 27 & 28 Vict. c. 13 (all now repealed by 51 & 52 Vict. c. 42). See *Webster* v. *Southey*, 36 Ch. Div. 9.

(*q*) 29 & 30 Vict. c. 57; 35 & 36 Vict. c. 24, s. 13.

instruments had been lost or destroyed by time or accident or the omission to enrol in proper time arose from ignorance or inadvertence, provided the instrument was made really and *bonâ fide* for full and valuable consideration, and possession or enjoyment was shewn to exist under it. These provisions were repealed and in substance re-enacted by the Mortmain and Charitable Uses Act, 1888 (*r*). This Act also repeals the Act 9 Geo. II. c. 36, and (in Part II., ss. 4, *et seq.*) substitutes provisions to the following effect: —Every assurance of land (or personal estate to be laid out in the purchase of land) for charitable uses is void unless it takes effect in possession immediately, and is without any power of revocation or reservation, condition or provision for the benefit of the "assuror" (grantor) or any person claiming under him, except (1) a nominal rent; (2) mines or minerals; (3) easements; (4) covenants or provisions as to buildings, streets, drainage or nuisances; (5) right of entry on nonpayment of such rent or breach of such covenants or provisions; (6) any stipulations of the like nature for the benefit of the grantor, or any person claiming under him.

Mortmain and Charitable Uses Act, 1888.

If the assurance is made *bonâ fide* on sale for full valuable consideration, the consideration may be a rent or rent-charge with or without a right of re-entry. If the land is freehold, it must be conveyed by deed executed in the presence of at least two witnesses; and, unless the assurance is made for full valuable consideration, it must be made at least twelve calendar months before the death of the grantor (*s*). The assurance (whether for valuable consideration or not) must be enrolled in the Central Office within six months after execution.

There are provisions enabling the deed to be enrolled after the six months where the omission to enrol arose from ignorance or inadvertence, or the loss or destruction of the instrument by time or accident.

Assurances by deed of land of any quantity, or by will of a quantity not exceeding twenty acres for a public park, not exceeding two acres for a public museum, and one acre for a schoolhouse for an elementary school, are (*t*) exempted from some of

Exemptions.

(*r*) 51 & 52 Vict. c. 42.

(*s*) Except in the case of assurances to local authorities under the Mortmain and Charitable Uses Act Amendment Act, 1892, 55 Vict. c. 11.

(*t*) See Part III. (ss. 6, *et seq.*) as to the exemptions and the Mortmain and Charitable Uses Act Amendment Act, 1892 (55 & 56 Vict. c. 11) as to assurances of land by deed to any local authority, *i.e.*, County and District Councils, &c.

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the requirements of the Act; but even in these cases the will (except in cases within the Mortmain and Charitable Uses Act, 1891, hereinafter discussed), or the deed (if not made in good faith for full and valuable consideration) must be executed not less than twelve months before the death of the testator or grantor, or the devise (except in the cases above indicated) must be a reproduction in substance of a devise made in a previous will executed not less than twelve months before the death of the testator; and the will must be enrolled within six months after the death of the testator, and the deed within six months from execution, in the books of the Charity Commissioners.

Conveyances or devises to certain Universities and colleges and assurances, otherwise than by will, in good faith and for value of land not exceeding two acres to trustees for religious purposes or the promotion of education, art, literature, science, or other like purposes, for the erection of a building for any of such purposes, or whereon a building used or intended to be used for any of such purposes has been erected, are exempted (by s. 7) from the provisions of the Act which impose the conditions above set forth on assurances to charitable uses. There is a clause (s. 8) providing that existing statutory exemptions from the repealed Mortmain Acts shall operate to exclude the corresponding provisions of the present Act.

Gifts by Will to Charities.

It is evident that no testamentary disposition could conform to the requirements of the above Acts (*u*), and, therefore, no valid gift of land could be made by will for charitable purposes unless it fell within the exemptions in the Mortmain and Charitable Uses Act, 1888 (*x*), or in some other statute, for instance, the Gifts for Churches Act, 1803 (43 Geo. III. c. 108), which enacts that a person may by deed enrolled, *or will* executed, three months at least before his death, give and grant lands or tenements not exceeding five acres, or goods and chattels not exceeding in value £500, for or towards the erecting, rebuilding, repairing, purchasing, or providing any church or chapel for the celebration of divine service according to the rites of the United Church of England and Ireland (*y*), or a residence for a minister

(*u*) See *Mayor of Canterbury* v. *Wyburn*, [1895] A. C. 89, where it was held that the Acts do not apply to colonial wills.

(*x*) 51 & 52 Vict. c. 42.

(*y*) This Act is repealed as to Ireland by 14 & 15 Vict. c. 71.

of that church, or any outbuildings, offices, churchyard, or glebe for the same, and to be for those purposes applied according to the will of the said benefactor in and by such deed enrolled, or by such will or testament executed as aforesaid (*z*).

Amending Act of 1891.

Now, however, by the Mortmain and Charitable Uses Act, 1891 (*a*), it is provided that land may be assured by will (where the testator dies after the passing of the Act, viz., 5th August, 1891) to or for the benefit of any charitable use: but the Act requires that the land shall be sold within one year from the death of the testator, or such extended period as may be determined by the Court or the Charity Commissioners, except (see s. 8) in cases where the Court or the Commissioners allow the land to be retained as being required for actual occupation for the purposes of the charity (*b*). The Act (see s. 10) is not to limit or affect the exemptions allowed by the Mortmain and Charitable Uses Act, 1888.

"Impure Personalty."

The Act of 1888 defined "land" so as to include "any estate and interest in land," so that the Act applied to leasehold interests in land and to certain kinds of personal property which were commonly referred to as "impure personalty," such as mortgages or charges on land. The Act of 1891 repeals this definition, and defines "land," for the purposes of these Acts, as not including "money secured on land or other personal estate arising from or connected with land." The result is that, while leaseholds are still subject to the Acts, "impure personalty" is not, and it may therefore be given or disposed of for charitable purposes not only by will but also by deed or other assurance or disposition *inter vivos*, and is not subject to the restrictions imposed by the Acts on gifts or dispositions of land for such purposes.

Reference should be made to alienations to what are called

(*z*) For cases under this Act, see *O'Brien* v. *Tyssen*, 28 Ch. Div. 372; *Re Vaughan*, *Vaughan* v. *Thomas*, 33 Ch. Div. 187 (bequest of money on trust to apply the income in repairing a churchyard); *Re Smith*, *Clements* v. *Ward*, 35 Ch. Div. 589 (bequest by married woman); and Tudor, Charit. Trusts, 436. See Tyssen, Charit. Bequests, Ch. XXVII. and XXVIII. and *post*, pp. 100, *et seq.* for other exemptions.

(*a*) 54 & 55 Vict. c. 73. See *Re Hume*, *Forbes* v. *Hume*, [1895] 1 Ch. 422, as to the effect of this provision. And see *Re Bridge*, [1893] 1 Ch. 44, [1894] 1 Ch. 297, that the Act (see s. 9) applies to a will made before, but by a testator who dies after, the passing of the Act.

(*b*) Except also in cases of gifts by will to institutions for promoting technical and industrial instruction and training: see the Technical and Industrial Institutions Act, 1892 (55 & 56 Vict. c. 29).

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Gifts to superstitious uses, and for forbidden religious trusts.

"superstitious uses" (*c*). By 1 Ed. VI. c. 14, the king was declared entitled to all real and certain personal property "theretofore" disposed of for the maintenance of persons to pray for the souls of dead men, &c.; such dispositions were declared to be superstitious, and, as such, void. By the 23 Hen. VIII. c. 10, similar and other superstitious uses "thereafter" declared of land (except for terms of not more than twenty years) were made void (*d*). There is no statute making superstitious uses void generally; but the Courts have treated the statute of Ed. VI. as a declaration that they are illegal (*e*). Gifts for superstitious uses and forbidden religious trusts are often confused (*f*). Gifts for superstitious uses are gifts which are regarded by our law as not being beneficial either to any particular person or the general public; *e.g.*, a gift to enable prayers to be said for the benefit of the soul of the testator or other deceased persons; gifts of this nature are absolutely void, and the property is treated as undisposed of (*g*). Forbidden religious trusts are trusts for the promotion of any religious views to which penalties are for the time being attached by law. In this case, though the gift cannot be applied in the manner intended by the donor or testator, it will be applied by the Court for charitable purposes as nearly in accordance with his wishes as the law will admit (*h*). The authorities shew that a gift to religious institutions or for a religious purpose, is *primâ facie* (though not necessarily) a gift for a "charitable purpose," in the legal sense of that expression (*i*). In popular language "charitable purposes" generally import a benefit to persons who, by reason of poverty, would not otherwise obtain such benefit (*k*). But the term "charity" has in law a meaning at once more restricted and more ample than

What are "Charitable purposes."

(*c*) Jarman on Wills, i. 162; Shep. T. 517; *Re Blundell's Trusts*, 30 Beav. 360; *Re Elliott*, W. N., 1891, p. 9; 39 W. R. 297. See as to superstitious uses, Tudor, Charit. Trusts, Ch. II., pp. 18, *et seq.*

(*d*) This Act is repealed by 51 & 52 Vict. c. 42. See as to its operation, Tyssen, Charit. Bequests, p. 46.

(*e*) *Heath* v. *Chapman*, 2 Drew. 417.

(*f*) Tyssen, Charit. Bequests, Ch. V., p. 36; Tudor, Charit. Trusts, 18.

(*g*) *West* v. *Shuttleworth*, 2 My. & K. 684; *Re Blundell's Trusts*, 30 Beav. 360.

(*h*) *Cary* v. *Abbot*, 7 Ves. 490; *Att.-Gen.* v. *Guise*, 2 Vern. 266; see Tyssen, Charit. Bequests, Ch. IX. and X.

(*i*) *Per* Lindley, L.J., in *Re White*, [1893] 2 Ch. 41.

(*k*) See *The Queen* v. *Commissioners of Income Tax*, 22 Q. B. D. 296, where the majority of the Court of Appeal held that the words have this meaning in the Income Tax Act of 1842 (5 & 6 Vict. c. 35). See, however, in S. C. sub nom. *Commissioners of Income Tax* v. *Pemsel*, [1891] A. C. 531, the remarks as to the popular meaning of "charity," especially at pp. 542, 571, 583.

the popular meaning. For, on the one hand, almsgiving or the relief of the poverty of individuals is not necessarily a charitable purpose in the legal sense, and, on the other hand, "charity" in the legal sense extends to many purposes which the law holds to be for the public benefit; and, in order to ascertain what are such purposes, recourse is usually had to the preamble of the statute 43 Eliz. c. 4 (*l*). In a recent case (*m*) the following remarks were made on this subject by Fry, L.J.:—

"The effect of the Statute was remarkable. The Court of Chancery had before that time jurisdiction in matters relating to charity, but, so far as I can ascertain, what was charity was a matter open to discussion. The Court, however, found, in the words to which I have referred [*i.e.*, the preamble of 43 Eliz. c. 4], a declaration of the meaning of the Legislature; and thenceforth 'charity' meant, in all Courts which had to do with the subject (but mainly in the Court of Chancery, because it was mainly concerned with the subject), all the uses and intents mentioned in the preamble to the Statute, and all uses and intents analogous to them. . . . From the time of this Statute the expressions 'charitable uses,' 'charitable purposes,' 'charitable trusts,' have, in my opinion, had a well-ascertained signification in English law."

And in the same case (*n*) Lord Macnaghten observed that "'charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads. The trusts last referred to are not the less charitable in the eye of the law because incidentally they benefit the rich as well as the poor, as indeed every charity that deserves the name must do either directly or indirectly."

But it has been pointed out by Lindley, L.J. (*o*), that these observations must not be taken to mean that everything which comes within any one of the four divisions mentioned must be a charity, but that all charities must come within one or other of them;

(*l*) This preamble mentions "releife of aged impotent and poor people, maintenance of sicke and maymed souldiers and marriners, schooles of learninge, free schooles and schollers in universities, repaire of bridges portes havens causwaies churches seabankes and highewaies, education and prefermente of orphans, reliefe stocke or maintenance for howses of correction, marriages of poore maides, supportation ayde and helpe of younge tradesmen, handiecraftesmen, and persons decayed, releife or redemption of prisoners or captives, aide or ease of any poore inhabitants concerninge paymente of fifteenes, settinge out of souldiers and other taxes."

(*m*) 22 Q. B. D. at p. 311.

(*n*) *Commissioners of Income Tax* v. *Pemsel*, [1891] A. C. 531, at 583.

(*o*) *Re Macduff*, [1896] 2 Ch. 451, at p. 466.

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not that every object of public general utility must necessarily be a charity. And it is further to be borne in mind that "the enumeration of charities in the preamble of the statute 43 Eliz. c. 4 is not exhaustive: for institutions whose objects are analogous to these mentioned in the statute are admitted to be charities; and, again, institutions which are analogous to those already admitted by reported decisions are held to be charities; but to be a charity there must be some public purpose—something tending to the benefit of the community"(*p*).

The Mortmain and Charitable Uses Act, 1888 (*q*), repeals the 43 Eliz. c. 4; but it sets out the preamble of that statute, and provides that references to charities shall be construed as references to charities "within the meaning purview and interpretation of the said preamble."

Exemptions from Mortmain Act.

Special exemptions from the operation of the Mortmain Act and the Mortmain and Charitable Uses Act, 1888 (*r*), have from time to time been introduced in favour of particular objects. Some of the more important exemptions are, by the Gifts for Churches Act, 1803, land not exceeding five acres towards providing a church, &c. (*s*); by the School Sites Acts, land not exceeding one acre, intended as a site for a school for the education of poor persons, or for the residence of the schoolmaster or schoolmistress, or otherwise for the purposes of the education of such poor persons in religious and useful knowledge (*t*). By the Literary and Scientific Institutions Act, 1854 (*u*), facilities were given for the conveyance of not more than one acre of land to be used as a site for institutions established for the promotion of science, literature, and the fine arts, for adult instruction, the diffusion of useful knowledge, the foundation or maintenance of libraries or reading rooms for general use among the members or open to the public, of public museums and galleries of paintings and other works of art, collections of natural history, mechanical and philosophical inventions, instruments, or designs. Provision was made by an

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(*p*) *Per* Chitty, J., *Re Foveaux*, [1895] 2 Ch. 501, where it was held that societies for the suppression and abolition of vivisection are charities within the legal definition of the term "charity."

(*q*) 51 & 52 Vict. c. 42; see s. 13 (2).

(*r*) 51 & 52 Vict. c. 42; see s. 8. See the exemptions detailed in Tyssen, Charit. Bequests, Ch. XXVIII., p. 381.

(*s*) 43 Geo. III. c. 108. Amended 51 Geo. III. c. 115. *Ante*, p. 96.

(*t*) 4 & 5 Vict. c. 38; 7 & 8 Vict. c. 37; 12 & 13 Vict. c. 49; 14 & 15 Vict. c. 24; 15 & 16 Vict. c. 49.

(*u*) 17 & 18 Vict. c. 112.

Act of 1868 (*x*), for the acquisition of two acres of land by societies or bodies of persons associated together for religious, educational, literary, scientific, or other like charitable purposes as sites for buildings for such purposes: and this is now replaced by a similar provision in the Act of 1888.

Under the Recreation Grounds Act, 1859 (*y*), any lands may be lawfully conveyed to trustees to be held by them as open public grounds for the resort and recreation of adults, and as playgrounds for children and youth. Under the Public Parks, Schools, and Museums Act, 1871 (*z*), it was permitted to give land or personal estate to be applied in the purchase of land, for public parks, schoolhouses for elementary schools, and public museums; but, if the gift was by will, it was limited to twenty acres for any one public park, two acres for any one public museum, and one acre for a school-house; but the will or deed of the testator or grantor was required to be made twelve months at least before his death, and enrolled in the books of the Charity Commissioners within six months next after the time when it should come into operation.

By the Consecration of Churchyards Act, 1867 (*a*), the powers in the School Sites Acts, 1841 and 1849 (4 & 5 Vict. c. 38, and 12 & 13 Vict. c. 49), were made applicable to grants not exceeding one acre for enlargement of churchyards or burial places in England or Wales.

By the Places of Worship Sites Act, 1873 (*b*), any quantity of land not exceeding one acre, and not being part of a demesne or pleasure ground attached to any mansion-house, may be conveyed as a site for a church, chapel, meeting-house, or other place of divine worship, or for the residence of a minister officiating in such place of worship or in any place of worship within one mile of such site, or for a burial place, or any number of such sites.

Under the Public Health Act, 1875 (*c*), any urban authority

(*x*) 31 & 32 Vict. c. 44, s. 1, repealed and re-enacted by 51 & 52 Vict. c. 42, s. 7 (ii.).

(*y*) 22 Vict. c. 27.

(*z*) 34 Vict. c. 13, repealed and re-enacted by 51 & 52 Vict. c. 42.

(*a*) 30 & 31 Vict. c. 133.

(*b*) 36 & 37 Vict. c. 50, amended by 45 & 46 Vict. c. 21.

(*c*) 38 & 39 Vict. c. 55, s. 164. See *Att.-Gen.* v. *Corp. of Sunderland*, 2 Ch. Div. 634, as to what buildings may be erected on lands acquired under the Act. See also 55 Vict. c. 11 as to assurances of land to local authorities; and *ante*, p. 93.

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may purchase or take on lease lands to be used as public walks or pleasure grounds.

Further exemptions from the operation of the Mortmain and Charitable Uses Act, 1888, are contained in the Working Classes Dwellings Act, 1890 (*d*), as to land for the purpose of providing dwellings for the working classes in the administrative county of London, any municipal borough, any urban sanitary district, and any other place having a dense population of an urban character; and in the Technical and Industrial Institutions Act, 1892 (*e*), as to lands purchased or given for the purposes of the Act. Under the Public Libraries Act, 1892 (*f*), land not exceeding one acre may be held by a library authority without licence in Mortmain.

Rule against perpetuities.

Another restriction imposed by law on the alienation of property (*g*) is that the disposition shall not be contrary to what is called the "rule against perpetuities," which prescribes certain limits of time beyond which the acquisition or vesting of the absolute interest in, or dominion over, the property may not be postponed. The object of the rule is in part the same as that of the prohibition of alienation in mortmain; namely, to prevent the tying up of property in such a way as to withdraw it from ordinary transferability. If there were no "rule against perpetuities," "that free and active circulation of property, which is one of the springs as well as the consequences of commerce, would be obstructed; the improvement of land checked; its acquisition rendered difficult; the capital of the country gradually withdrawn from trade; and the incentives to exertion in every branch of industry diminished" (*h*).

Hence, as a general principle of the law, no one can make any such disposition or settlement of his property as would tie it up, that is, defer its vesting absolutely in any person, for a period longer than a life, or several lives, in being at the time of the disposition or settlement, and twenty-one years after the expiration of such life or lives; or, more accurately, twenty-one years with an allowance for a period of gestation, in cases where gestation exists (*i*). Thus, where it is sought to settle or dispose

(*d*) 53 & 54 Vict. c. 16.
(*e*) 55 & 56 Vict. c. 29, s. 10.
(*f*) 55 & 56 Vict. c. 53; see s. 13.
(*g*) See *ante*, pp. 85, 88.
(*h*) Jarman, i. 213.
(*i*) *Cadell* v. *Palmer*, 7 Bligh (N. S.) 202; 1 Cl. & F. 372; and see this case and notes thereto in Tud. L. C. R. P. See the rule discussed in Challis, R. P. 168, *et seq.* *Post*, p. 286.

of property after the expiration of some existing life in favour of a person unborn at the date of the settlement or disposition, as an ordinary rule it is necessary that that person should come into being at the latest within a period of twenty-one years from the expiration of the life in question; but a child *en ventre sa mère* is, for the purposes of the rule against perpetuities, considered as in existence (*k*).

A perpetuity has been defined as "a future limitation, restraining" [*i.e.*, in effect, preventing] "the owner of the estate from aliening the fee simple of the property, discharged of such future use or estate, before the event is determined or the period arrived when such future use or estate is to arise. If that event or period be within the bounds prescribed by law, it is not a perpetuity" (*l*).

A limitation which infringes the rule against perpetuities is said to be "void for remoteness."

Remainder after estate tail.

The creation of an estate tail is not considered to infringe the rule; for, though an estate tail unbarred may last for generations, it is always in the power of the tenant in tail to destroy the estate tail and acquire the fee simple. And the rule has never been considered to affect limitations subsequent to an estate tail, because such limitations have always been liable to destruction, formerly by a common recovery and now by the method provided by the Fines and Recoveries Act, 1833 (*m*).

Remainder to child of unborn person.

It is sometimes said that no legal remainder can be too remote, but this is an error (*n*). It has in a recent case (*o*) been laid down by the Court of Appeal that the rule of law still exists that where an estate for life is limited to an unborn person, a remainder cannot be limited (as to the legal estate) to a child of that unborn person; and that this rule is independent of the more modern rule against perpetuities, which prohibits the tying up of property for a longer period than a life or lives in being and twenty-one years afterwards. It will be observed that the effect of the modern rule against perpetuities may be different from that of the rule, above referred to, which restricts Common law limitations by way of estates for life with remainders over;

(*k*) *Long* v. *Blackhall*, 7 T. R. 100.

(*l*) Sanders on Uses, 204.

(*m*) Challis, R. P. 168, citing *Nicolls* v. *Sheffield*, 2 Bro. C. C. 215; *Heasman* v. *Pearse*, L. R. 7 Ch. 275.

(*n*) *Re Frost*, 43 Ch. Div. 246.

(*o*) *Whitby* v. *Mitchell*, 44 Ch. Div. 85, affirming the decision of Kay, J., 42 Ch. Div. 494. See this rule stated and discussed, Challis, R. P. 104.

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for under the latter the period during which the land may be inalienable is limited to the lives of the persons actually taking estates and the minority of the ultimate remainderman; whereas under the rule against perpetuities, though the absolute interest must vest within a period measured by lives in being and twenty-one years afterwards, yet the person in whom the estate vests at the end of that period may be an infant, whose disability might (apart from statutory powers) prevent alienation for a further period of almost twenty-one years (*p*). The result of the modern rule has been expressed (*q*) in the proposition that all future interests or claims in, to, or upon any specified property, whether real or personal, which do not arise under, or take effect by virtue of, the rules of the Common law, and are not subsequent to an estate tail, must (with a few exceptions) (*r*) vest absolutely within certain specified limits of time.

So stringent is the rule against perpetuities, that a gift which may possibly exceed the prescribed limit is void, even though in the event it happens to vest absolutely within that limit. To take an instance; a testator gave his real and personal estate to trustees upon trust for his wife during widowhood, and after her death or second marriage for his children who might be living at such death or second marriage and the issue of any child who might have previously died, such issue to take the share of his or her deceased parent in equal shares, the share of such of his children or grandchildren as should be a son or sons to become vested in and payable to them as and when he or they should respectively attain the age of twenty-four years, and the shares of his daughters or the female issue of any deceased child to be settled as therein mentioned. It will be seen a child might die in the lifetime of the widow, or before her second marriage, leaving a son under the age of one year; the widow might then die or marry, and such son might not attain twenty-four years within the period allowed by the rule. A will takes effect at the death of the testator, and any gift made by it is void for remoteness if it does not necessarily take effect within twenty-one years from the termination of any life then in being. Consequently, the whole of the gifts after the life interest of the widow were void for remoteness (*s*). In another case the testator gave a

(*p*) See Leake, Law of Prop. in Land, p. 441, note (*c*).

(*q*) Challis, R. P. 168.

(*r*) For the exceptions see Challis, R. P. 173.

(*s*) *Hale* v. *Hale*, 3 Ch. Div. 643,

freehold estate to trustees and their heirs during the life of his daughter on trust for her and after her death to the use of any husband "whom she may hereafter marry" during his life with remainders over after the death of the survivor of the daughter and her husband; and it was held that, as the husband would not necessarily be born in the testator's lifetime, the remainders after the death of the survivor were too remote (*t*).

It will have been observed (*u*) that the rule applies as well to personal as to real estate; but it is held that the rule does not apply to the transfer, in a specified event, of property from one charity to another charity (*x*).

Accumulation of income (Thellusson Act).

What has been said applies to the *corpus* of the property; and until the Accumulations Act, 1800, popularly known as the Thellusson Act (*y*), the income of property might have been rendered inalienable, by means of a trust for accumulation, during a period commensurate with that within which the *corpus* might be tied up. All that the law required was that the accumulation should not exceed that limit. A certain Mr. Thellusson, however, who lived in the reign of George III., and was the possessor of a very ample fortune (his real estate was of the annual value of about £5,000, and the residue of his personal estate about £600,000), conceived the whimsical idea of swelling this in the possession of his posterity to an almost fabulous amount, by directing by his will the accumulation of the income of the whole of his vast property during the lives of all his children, grandchildren, and great grandchildren, who might be living at the time of his death, and the life of the survivor of them, for the benefit of some future descendants who should be living at the death of such survivor, and between whom the property and accumulations of income were then to be divided. It was computed, that supposing the survivor of the persons during whose lives the accumulation was to continue should live

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M. R.; and see *Pearks* v. *Moseley*, 5 App. Cas. 714.

(*t*) *Re Frost*, 43 Ch. Div. 246.

(*u*) *Hale* v. *Hale*, *ubi sup.*

(*x*) *Christ's Hospital* v. *Grainger*, 1 Mac. & G. 460; *Re Tyler*, [1891] 3 Ch. 252; but the rule does extend to cases where an immediate gift to private individuals is followed by an executory gift in favour of a charity, or *vice versâ*: *Re Bowen* [1893] 2 Ch. 491; or where a gift to a charity is subject to a condition precedent which may not be fulfilled within the time prescribed by the rule: *Re Lord Stratheden and Campbell*, [1894] 3 Ch. 265.

(*y*) 39 & 40 Geo. III. c. 98; see 2 Vaizey on Settlements, 1037; Challis, R. P. 186, *et seq.*

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seventy years, the property at the end of that period, if improved at compound interest at the rate of 5 per cent., would have amounted to about nineteen millions sterling (*z*). This extraordinary bequest became the subject of litigation; but it was held to be valid, as falling within the limits sanctioned by the law. To prevent such mischievous dispositions in future, the Act in question, the 39 & 40 Geo. III. c. 98, was passed; and it applies to the disposition of personal as well as of real estate. It enacts that no person by deed, will, &c., shall settle or dispose of any real or personal property, so that the rents, profits, or produce thereof shall be wholly or partially accumulated for any longer term than (1) the life or lives of any such grantor or grantors, settlor or settlors; or (2) the term of twenty-one years from the death of such grantor, settlor, devisor, or testator; or (3) during the minority or respective minorities of any person or persons who shall be living or *en ventre sa mère* at the time of the death of such grantor, devisor, or testator; or (4) during the minority or respective minorities only of any person or persons who under the deed, will, &c., directing such accumulations would for the time being, if of full age, be entitled to the rents, profits, or produce. This does not allow an accumulation during the minority of a child unborn at the time when the instrument comes into operation (*a*). Where an accumulation is directed exceeding the limits allowed by the Act, the income, so long as it is directed to be accumulated contrary to the provisions of the Act, goes to such person or persons as would have been entitled thereto if such accumulation had not been directed. This does not mean that it will go to the person entitled after the period for which the accumulation is directed. Thus (*b*), where a man devised an estate to trustees in trust for his wife for life, or until second marriage; and in case of second marriage directed the income to be accumulated during the remainder of her life, and then gave the remainder with accumulations after her death to a stranger; the widow, having married again, and lived more than twenty-one years from the testator's

(*z*) *Thellusson* v. *Woodford*, 4 Ves. 237; see 2 Vaizey on Settlements, 1036.

(*a*) Lord Langdale, in seeking to construe this clause, alludes to the difficulty of attributing a distinct and efficient meaning to all the words of this Act: *Ellis* v. *Maxwell*, 3 Beav. 596.

(*b*) *Weatherall* v. *Thornburgh*, 8 Ch. Div. 261. See the rules as to the destination of income freed from accumulation by the Act stated in 1 Jarman, 281.

death, it was held there was an intestacy as to accumulations during the period between twenty-one years from the testator's death and the death of his widow; and that, as the testator had no heir, the Crown took the income for the rest of the life of the testator's wife.

The Act authorizes accumulation during any of the four periods, and only for one of those periods; and therefore a direction in a will to accumulate the income of trust funds for twenty-one years after the testator's death, and at the expiration of that term during the minorities of the persons entitled under the trusts, was held to be good only for twenty-one years (*c*). The Act does not apply to any provision for payment of debts, or for raising portions for children, or touching the produce of timber (*d*). If, however, the allowed period is exceeded (provided the case does not fall within the rule against perpetuities) the direction for accumulation is good *pro tanto* (*e*). But, if accumulation is directed for a period which would exceed that which is allowed by the rule against perpetuities, the direction will be totally void. In applying the Act, the Court is bound to consider not merely the events which have happened, but also those which might have happened (*f*).

Exceptions from Act.

A further restriction on accumulation is imposed by the Accumulations Act, 1892 (*g*), which forbids accumulation of the income of property settled after the 27th June, 1892, for the purchase of land only, for any longer period than during the minority or respective minorities of any person or persons who under the uses or trusts of the instrument directing such accumulation would for the time being, if of full age, be entitled to receive the income directed to be accumulated.

(*c*) *Wilson* v. *Wilson*, 1 Sim. (N. S.) 288; the Act is given *verbatim* at p. 295. See *Jagger* v. *Jagger*, 25 Ch. Div. 729. Now it is sometimes unnecessary to give any directions for the accumulation of income during minorities, owing to the provisions of the Conveyancing Act, 1881, 44 & 45 Vict. c. 41, ss. 42, 43, as to the maintenance of infants and the accumulation of the surplus income. See 35 Sol. J. 150, 238.

(*d*) A trust or direction in the nature of a discretionary trust, to apply in due course of administration a portion of the income of property in keeping the property in repair, is not within the Act: *Vine* v. *Raleigh*, [1891] 2 Ch. 13; and see *Re Mason*, [1891] 3 Ch. 467.

(*e*) The Act has given rise to numerous questions in respect of which reference may be made to Vaizey on Settlements, vol. ii., pp. 1037, *et seq.*; Hayes & Jarman, 348, 351; and the notes to the leading case of *Griffiths* v. *Vere* (reported 9 Ves. 127) in Tudor L. C. R. P. 497.

(*f*) *Jagger* v. *Jagger*, 25 Ch. Div. 729.

(*g*) 55 & 56 Vict. c. 58; see *Re Danson*, [1895] W. N. 102; 13 R. 633; 39 Sol. J. 557.

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Aliens.

There was, prior to the Naturalization Act, 1870 (*h*), a practical restriction on alienation of land (including leaseholds) in favour of aliens, *i.e.*, persons not owing allegiance to the Crown; for if land was conveyed to an alien, he was legally incapable of holding it, and it was liable to be forfeited to the Crown on the institution by the Crown of the requisite proceedings to enforce the forfeiture (*i*).

These proceedings were a writ of inquisition or inquiry for the ascertainment of the facts of the conveyance, and of the alienage, and on the return to the inquisition, technically termed "office found," being made, the Crown was entitled to seize the land (*k*). In the meantime, however, until office found, a *primâ facie* title vested in an alien. He might even, in the event of his ouster, maintain an action of ejectment, and might himself make a conveyance, subject only to be defeated by the assertion of the rights of the Crown (*l*).

But, by an Act passed in 1844, a lease taken by a subject of a friendly State for a term not exceeding twenty-one years, for the residence or occupation of himself or his servants, or for the purpose of any trade, business, or manufacture, was privileged, and not liable to forfeiture (*m*). And by the Naturalization Act, 1870—

> S. 2. "Real and personal property of every description may be taken, acquired, held and disposed of by an alien in the same manner in all respects as by a natural-born British subject; and a title to real and personal property of every description may be derived through, from, or in succession to an alien, in the same manner in all respects as through, from, or in succession to a natural-born British subject" (*n*).

Lis pendens.

It has long been the doctrine of the Courts, both in equity and

(*h*) 33 & 34 Vict. c. 14, amended by 33 & 34 Vict. c. 102, 35 & 36 Vict. c. 39, and 58 & 59 Vict. c. 43.

(*i*) If an alien purchase lands, he is of capacity to take a fee simple, that is, to become a purchaser, but not to hold: Co. Litt. 2 b, 42 b, 117 a; see *Sharp* v. *De St. Sauveur*, L. R. 7 Ch. 343; and as to the effect of a grant to an alien, *Fish* v. *Klein*, 2 Mer. 431.

(*k*) By 22 & 23 Vict. c. 21, s. 25, the right of the Crown may be enforced without inquisition or office found, or actual re-entry.

(*l*) Shep. T. 232; *Fish* v. *Klein*, 2 Mer. 431.

(*m*) 7 & 8 Vict. c. 66, s. 5, and by s. 3 any person born of a mother "being a natural-born subject of the United Kingdom" was enabled to hold real estate. On the old law as to the rights of the Crown on an alien purchasing lands, see Chitty Prerog., p. 229. As to *inquisition* or *inquest* of office, *ib.*, p. 246.

(*n*) 33 & 34 Vict. c. 14; but it is provided (s. 14) that nothing in the Act contained shall qualify an alien to be the owner of a British ship. The same Act deprived

at Common law (*o*). that during the pendency of a suit respecting land, any alienation of the land must be subject to the decision in the suit; in other words, neither party to the litigation can alienate the property in dispute so as to affect his opponent. The law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party. This is called the doctrine of *lis pendens* (*p*).

"It is not founded," says Turner, L.J. (*q*), "upon any of the peculiar tenets of a Court of Equity as to implied or constructive notice. It is a doctrine common to the Courts, both of law and of equity, and rests upon this foundation,—that it would plainly be impossible that any action or suit could be brought to a successful termination, if alienations *pendente lite* were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendant's alienating before the judgment or decree, and would be driven to commence his proceedings *de novo*, subject again to be defeated by the same course of proceeding."

To constitute a *lis pendens*, there must be a continuance of the proceedings; therefore if the action be ended, by judgment or otherwise, there is no *lis pendens* to affect the lands (*r*). A *lis pendens* formerly bound all persons whether they had notice of it or not: but, for the protection of purchasers, by the Judgments Act, 1839 (*s*), provision was made for the registration and re-registration of the cause; and unless and until it is made no purchaser or mortgagee is to be bound by a *lis pendens* unless he has express notice of it. There is to be registered a memorandum containing the name and abode, title, trade or profession, of the person whose estate is intended to be affected, and the Court of Equity, and the title of the cause. And as the registration of a *lis pendens* could not be vacated without the consent of the person by whom it was registered, and such consent was sometimes withheld although the suit or proceeding was at an

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an alien of the right to be tried by a jury *de medietate linguæ*, and made him liable to be tried in the same manner as a natural-born subject; and enabled British subjects, where in a foreign State, and not under disability, to become voluntarily naturalized in such State, to renounce their allegiance, that is, to cease to be British subjects, and become aliens.

(*o*) *Bellamy* v. *Sabine*, 1 De G. & J. 580, 584.

(*p*) As to *lis pendens*, see Elph. & Cl. Searches, p. 91; *Price* v. *Price*, 35 Ch. Div. 297; Wms. R. P. 273; 2 W. & T. 75, *et seq.* The doctrine of *lis pendens* does not apply to personal property, other than chattel interests in land: *Wigram* v. *Buckley*, [1894] 3 Ch. 483, where the doctrine is discussed.

(*q*) In *Bellamy* v. *Sabine*, 1 De G. & J. at p. 584.

(*r*) *Kinsman* v. *Kinsman*, 1 R. & M. 622, *per* Lord Lyndhurst, L.C.

(*s*) 2 & 3 Vict. c. 11, s. 7.

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end, or was not being *bonâ fide* prosecuted, it was enacted by the Lis Pendens Act, 1867 (*t*), that the Court, before which the property sought to be bound is in litigation, may, upon the determination of the *lis pendens*, or during the pendency thereof, where the Court shall be satisfied that the litigation is not prosecuted *bonâ fide*, make an order for vacating the registration without the consent of the party who registered it (*u*).

Voluntary settlements.

The ordinary legal effect of alienation is modified in the case of voluntary conveyances or settlements, *i.e.*, alienations made otherwise than for valuable consideration (*x*). A voluntary conveyance or settlement if "executed," *i.e.*, fully completed, is binding on the grantor or settlor himself, and cannot be undone by him unless he has expressly reserved a power to revoke it (*y*), or can establish a case upon which the Court will order it to be set aside; as, for instance, on the ground that he was induced to make it by undue influence (*z*), or that he did not understand the effect of what he was doing (*a*). But, though binding on the settlor (and those claiming under him as volunteers), a voluntary settlement may be ineffectual by virtue of the operation of certain statutes which we proceed to notice.

—when irrevocable.

13 Eliz. c. 5. Creditors.

A statute of the reign of Elizabeth (*b*) avoids as against creditors all alienations or conveyances of lands or goods made with

(*t*) 30 & 31 Vict. c. 47, s. 2.

(*u*) See *Pooley* v. *Bosanquet*, 7 Ch. Div. 541; *Strousberg* v. *McGregor*, 6 T. L. R. 145 (order made at hearing, where action dismissed), and see *post*, pp. 387, 388.

(*x*) As to consideration, see *post*, Ch. XIV.

(*y*) *Paul* v. *Paul*, 19 Ch. Div. 47; 20 Ch. Div. 742. See for examples the cases of *Bill* v. *Cureton*, 2 My. & K. 503, where a voluntary settlement was made by an unmarried woman, and *Petre* v. *Espinasse*, 2 My. & K. 496, where the settlor was a bachelor. Though these settlements were not made in contemplation of marriage, they were held to be irrevocable. But it must be noted that this doctrine applies only where the trusts in favour of volunteers are fully executed: where they are executory only, *e.g.*, where there is only a contract or covenant to settle, a volunteer cannot enforce them; see *Re Anstis*, *Chetwynd* v. *Morgan*, 31 Ch. Div. 596. To constitute an executed and irrevocable settlement there must be either a complete conveyance or transfer of the property, or a declaration by the settlor that he holds it in trust. See on this subject the notes to *Ellison* v. *Ellison* in 1 W. & T., and Watson, Comp. Eq., vol. i., pp. 300, 311, *et seq.*

(*z*) As to what is undue influence, see *Wingrove* v. *Wingrove*, 11 P. D. 81. As to parental influence, see *Wright* v. *Vanderplank*, 2 K. & J. 1; *Savery* v. *King*, 5 H. L. 627; *Bainbrigge* v. *Browne*, 18 Ch. Div. 188; *Hoblyn* v. *Hoblyn*, 41 Ch. Div. 200; as to dealings between a solicitor and his client, see *Savery* v. *King*, *ubi sup.*; *Liles* v. *Terry*, [1895] 2 Q. B. 679; *Wheeler* v. *Sargeant*, 69 L. T. 181; as to religious influence, *Allcard* v. *Skinner*, 36 Ch. Div. 145; *Morley* v. *Loughnan*, [1893] 1 Ch. 736.

(*a*) *See Dutton* v. *Thompson*, 23 Ch. Div. 278; *Ogilvie* v. *Littleboy*, [1897] W. N. 53.

(*b*) 13 Eliz. c. 5, made perpetual by 29 Eliz. c. 5.

intent to delay, hinder, or defraud them; but the Act (see s. 5) is not to extend to any estate or interest in lands or goods, on good, which here means valuable, consideration and *bonâ fide* lawfully conveyed to any person not having notice of the fraud (*c*). This Act, it will be observed, applies to both real and personal property, and protects creditors.

27 Eliz. c. 4. Purchasers.

As to lands only, and for the protection of purchasers for value, a later statute of the same reign (*d*) provided that conveyances, charges, leases, &c., of lands, made with intent to defraud and deceive purchasers, and all conveyances with a clause of revocation at the grantor's pleasure (*e*), should be void against such purchasers. A settlement made in consideration of marriage, whether executed prior to the marriage, or after the marriage, but in pursuance of articles entered into before the marriage, is not within these statutes (*f*), for marriage is a valuable consideration.

13 Eliz. c. 5.

Many questions have arisen under these statutes, in respect of which reference may be made to *Twyne's Case* (*g*). In that case, which arose under the statute 13 Eliz. c. 5, it was held that a conveyance of goods was void, because, though for good consideration, it was not *bonâ fide*, the debtor having been allowed to remain in possession; and the statute requires that there should be *bona fides* as well as good consideration (*h*). A presumption of intent to defraud is held to arise from the grantor remaining in possession of the property conveyed; but it is now held that it is a question of fact in each case whether the transaction was *bonâ fide* or was a contrivance to defraud creditors (*i*).

"As regards the statute 13 Eliz. c. 5, the rule was correctly laid down by the late Vice-Chancellor Kindersley in the case of *Thompson* v. *Webster* (*k*), in which he says:—'The principle now established is this: The language of the Act being that any conveyance of property is void against creditors if it is made with *intent* to defeat, hinder, or delay

(*c*) This saving clause includes a purchaser for value, without notice, of any interest whether legal or equitable, under the voluntary settlement itself, and prevents the deed being void against him: *Halifax Banking Co.* v. *Gledhill*, [1891] 1 Ch. 31. This statute and 27 Eliz. c. 4, are given in the notes to *Twyne's Case*, 1 Sm. L. C. 1.

(*d*) 27 Eliz. c. 4, made perpetual by 39 Eliz. c. 18.

(*e*) 27 Eliz. c. 4, s. 4.

(*f*) See 2 Prid. 287.

(*g*) 1 Sm. L. C. 1.

(*h*) See *per* Fry, J., *Re Johnson, Golden* v. *Gillam*, 20 Ch. Div. 389, at p. 393.

(*i*) 1 Sm. L. C., 10th ed., p. 11.

(*k*) 4 Drew. 632.

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creditors, the Court is to decide in each particular case whether, on all the circumstances, it can come to the conclusion that the *intention* of the settlor in making the settlement was to defeat, hinder, or delay his creditors.' " (*l*).

It may be added that it has been held that a conveyance is not fraudulent and void, either under the statute 13 Eliz. c. 5, or at Common law, merely because it is intended to defeat the expected execution of a particular creditor, provided that it was for valuable consideration and *bonâ fide*—*i.e.*, that it was the intention of both parties to buy and sell in reality (*m*).

Both statutes, it will be observed, in terms refer to a conveyance of the property *with intent* to defraud. Under the statute 13 Eliz. c. 5, as we have seen, a settlement or conveyance, though for value, is void if it is not *bonâ fide*; and, on the other hand, it has been decided that the mere fact of its being voluntary is not enough to render it void against creditors; but there must be other circumstances proving a fraudulent intent; for instance, unpaid debts existing at the time of making the settlement or conveyance; or the fact that the settlor or grantor was, at the time, not necessarily insolvent, but so largely indebted as to induce the Court to believe that the intention of the disposition, taking the whole transaction together, was to defraud the creditors (*n*).

27 Eliz. c. 4.

But as to the 27 Eliz. c. 4, it was established by a judicial interpretation of that statute that, as a rule of law, if a man made a voluntary conveyance of land to A. and then made a conveyance of the same land for valuable consideration to B., even if B. had notice of the voluntary conveyance, the former conveyance was fraudulent and void under the statute as against B.; it being taken conclusively as against the vendor and A., that the voluntary conveyance was made with intent to defraud a subsequent purchaser (*o*).

(*l*) *Godfrey* v. *Poole*, 13 App. Cas. 497, at p. 503; a case before the Judicial Committee of the Privy Council. In *Ex parte Mercer*, 17 Q. B. D. 290, the C. A. expressed the opinion that the mere fact that the necessary consequence of the alienation is to defeat creditors is not *per se* sufficient evidence that there was an intent to defraud them.

(*m*) *Wood* v. *Dixie*, 7 Q. B. 892; Elph. & Cl. Searches, 77.

(*n*) See *Holmes* v. *Penney*, 3 K. & J. 90, as to creditors at the time of the settlement: and see *Jenkyn* v. *Vaughan*, 3 Dr. 419, as to subsequent creditors.

(*o*) *Doe* d. *Newnam* v. *Rusham*, 17 Q. B. 723; see *Buckle* v. *Mitchell*, 18 Ves. at p. 110; 2 Vaizey on Settlements, 1538, *et seq.* This "strained interpretation" of the statute was held by the Judicial Committee of the Privy Council not to be applicable to gifts to charities: *Ramsay*

With respect to this judicial interpretation of the statute, Cockburn, C.J. (*p*), said:—

"If its construction had been *res integra*, there has been no Judge who, in modern times, has had to apply the statute, who would not probably have excluded from its operation family settlements made honestly and without any intention of defrauding creditors or future purchasers. The statute has seldom come under review without eliciting judicial observations on the forced and harsh construction put upon it by its first expounders; but its operation in avoiding in favour of purchasers for value, whether with or without notice, conveyances in favour of relations, however honest and otherwise praiseworthy, if made without valuable consideration, is now too firmly established to admit of being questioned; and it must now be taken as definitely settled that a provision even for a man's wife and children (*q*), however sacred in a moral point of view the duty of making such provision may be, is bad against a future purchaser, as being without consideration and voluntary."

But it was held that a subsequent purchase would not prevail against a voluntary conveyance, unless the vendor was the person who made the voluntary conveyance. Therefore, a purchaser from the devisee of one who had made a voluntary conveyance in his lifetime, is not entitled, under 27 Eliz. c. 4, to "avoid" that voluntary conveyance (*r*). Lord Campbell, C.J., said:—

"The principle on which voluntary conveyances have been held uniformly to be fraudulent and void as against subsequent purchasers appears to be, that, by selling the property for a valuable consideration, the seller so entirely repudiates the former voluntary conveyance, and shows his intention to sell, as that it shall be taken conclusively, against him and the person to whom he conveyed, that such intention existed when he made the conveyance, and that it was made in order to defeat the purchaser. Such deeds have been held fraudulent and void as against such purchasers, even when they have had notice of them (*s*). Where the same person executes the voluntary conveyance, and afterwards sells and conveys the property, the application of the principle is obvious and easy. But where the seller is a different person from him who executed the voluntary conveyance, it is quite otherwise; for the acts of one man cannot show the mind and intention of another (*t*)."

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v. *Gilchrist*, [1892] A. C. 412. It was held also that the voluntary grantees have no right in equity against the purchase money; *Daking* v. *Whimper*, 26 Beav. 568; *Townend* v. *Toker*, L. R. 1 Ch. 446, at p. 460.

(*p*) In *Clarke* v. *Wright*, 6 H. & N. 870.

(*q*) *I.e.*, not being one made in consideration of the marriage: but a mere post-nuptial settlement, not in pursuance of ante-nuptial articles.

(*r*) *Doe* d. *Newman* v. *Rusham*, 17 Q. B. 723; *Godfrey* v. *Poole*, 13 App. Cas. 497.

(*s*) *Doe* d. *Ottley* v. *Manning*, 9 East, 59.

(*t*) This passage is cited with approval in *Godfrey* v. *Poole*, 13 App. Cas. 497, at p. 504.

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It was also held that a purchase from one to whom a voluntary conveyance has been made cannot be disturbed by a subsequent conveyance from the original settlor (*u*). "It follows," says Mr. Prideaux (*x*), "that a purchaser can seldom be advised to take a title from a person who has executed a voluntary settlement, (1) because the volunteer may have subsequently sold or mortgaged, and (2) because there may have been some other consideration not disclosed on the face of the settlement."

A consideration, however small, will take the case out of the statute 27 Eliz. c. 4. It was said by James, L.J., in *Price* v. *Jenkins* (*y*):—

"If there is any valuable consideration for a settlement, the *quantum* of such a consideration is of no consequence under the Statute of Elizabeth."

In that case, the settlement was an assignment by a widower, on his second marriage, of leaseholds to trustees in trust for himself for life, and after his death for his son, who was one of the trustees. It was held that, as the trustees became liable for payment of rent and performance of the covenants of the lease, there was a valuable consideration sufficient to support the settlement against a subsequent purchaser (*z*).

Voluntary Conveyances Act, 1893.

The statute 27 Eliz. c. 4 is not repealed; but the "forced and harsh construction" put upon it, as above mentioned, has been displaced by the Voluntary Conveyances Act, 1893 (*a*), which enacts that (subject to cases in which there have been dealings for value with the land before 29th June, 1893; see s. 3) no voluntary conveyance of lands, whether made before or after the passing of the Act, if in fact made *bonâ fide* and without any fraudulent intent, shall be deemed fraudulent within

(*u*) *George* v. *Milbanke*, 9 Ves. 190.

(*x*) Vol. ii., 14th ed., p. 258. See *Clarke* v. *Willott*, L. R. 7 Ex. 313; Elph. Introd. 70.

(*y*) 5 Ch. Div. 619, at p. 621. This case does not apply to 13 Eliz. c. 5: see *per* Jessel, M.R., *In re Ridler*, 22 Ch. Div. 81; and it must not be assumed that if a man makes a settlement of a large freehold estate along with a small leasehold, the settlement would be held to be made for good consideration within the statute 13 Eliz. c. 5 (see *per* Jessel, M.R., *ib.*).

(*z*) And see *In re Foster and Lister*, 6 Ch. Div. 87, and *Teasdale* v. *Braithwaite*, 5 Ch. Div. 630, where post-nuptial settlements of lands belonging to a wife were held to be for valuable consideration. It would seem that in cases within the Married Women's Property Act, 1882, the principle of these cases does not apply.

(*a*) 56 & 57 Vict. c. 21.

27 Eliz. c. 4 by reason of any subsequent purchase for value, or be defeated under that Act by a conveyance made upon any such purchase.

Bankruptcy Act, 1883, and voluntary settlements.

The rule avoiding voluntary settlements as against creditors was extended, in the case of traders, by the Bankruptcy Act, 1869 (*b*). The distinction between traders and non-traders is abolished by the Bankruptcy Act, 1883 (*c*), which contains (s. 47) a provision similar to that in the Act of 1869, except that, to support a voluntary settlement made within ten years of bankruptcy, it must now be shown that the settlor's interest passed to the trustee of the settlement on execution. The section referred to enacts that any settlement (that is, any conveyance or transfer) of property, not being (1) a settlement made before and in consideration of marriage; or (2) made in favour of a purchaser or incumbrancer, in good faith and for valuable consideration; or (3) a settlement made on or for the wife or children of the settlor, of property which has accrued to the settlor after marriage in right of his wife; shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void as against the trustee in the bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void against the trustee in bankruptcy, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof (*d*).

Life estate determinable on life tenant's bankruptcy, &c.

Neither the *corpus* nor the income of property can be effectually settled so as to confer upon any person a right to continue in the enjoyment of it after his bankruptcy. Nor can the

(*b*) 32 & 33 Vict. c. 71, s. 91.

(*c*) 46 & 47 Vict. c. 52, s. 47; see also s. 29 (2).

(*d*) It has been held that "void," here means "voidable," and a *bonâ fide* purchaser from the donee under a voluntary settlement, has a good title against the trustee in bankruptcy: *Re Brall*, [1893] 2 Q. B. 381 (discussed in 37 Sol. J. 695). Approved by the Court of Appeal in *Re Carter and Kinderdine*, [1897] 1 Ch. 776. See *Re Vansittart*, [1893] 2 Q. B. 377, as to personal property. Where a settlement is set aside under s. 47 as void against the trustee in bankruptcy, he does not stand in the place of the beneficiaries under the settlement, so as to give unsecured creditors priority over mortgages or charges subsequent to it; *Sanguinetti* v. *Stuckey's Banking Co.*, [1895] 1 Ch. 176, and approved in *In re Farnham*, [1895] 2 Ch. 799.

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corpus of any property be effectually settled upon a man (*e*) with a proviso that he shall have no power to alienate it, or that if he attempt to alienate it his interest shall cease; for such an attempted restriction on alienation would be held by our law to be void. But the law allows the income of property, whether his own (*f*) or that of another, to be settled on a person for life or *until* he shall attempt to alienate or encumber his interest in it, so that he will have what is called a determinable life interest in the income. And a similar interest may be limited to a person determinable on his bankruptcy, provided that the settled property did not belong to himself before the settlement; but a life interest in his own property cannot be made determinable on his bankruptcy (*g*).

Debts after death.

After the death of the debtor, any real property held for an estate in fee simple, of which he may die seised, is under the present state of the law available equally with his personal estate for the satisfaction of his debts, whether "specialty debts," or debts "by simple contract." A "specialty debt" is one secured by a bond or other deed: a "simple contract debt" is any debt not coming under the description of debts of record (*e.g.*, judgment debts), or debts by specialty. Even an acknowledgment in writing would not constitute a debt a specialty, unless the writing were sealed and delivered as a deed; so that a liability contracted under a bill of exchange, for example, notwithstanding the formality of the instrument, does not amount to more than a simple contract debt (*h*). The estate of the debtor is subject after his death to the liability in question, whether in the hands of a devisee under a testamentary disposition, or of the heir in default of such disposition.

The liability of real property to the debts of its deceased owner was not completely established until a comparatively recent date. Formerly there was no such liability except where the debtor had by specialty expressly bound his heirs as well as himself to pay

(*e*) It is otherwise in the case of a woman; a restraint upon anticipation (*i.e.*, alienation) can be effectually imposed on a married woman; or if she be unmarried to arise on her marriage. But, even as to a woman, such a restraint, in a settlement of her own property, is invalid as against ante-nuptial creditors in cases falling within s. 19 of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75).

(*f*) *Brooke* v. *Pearson*, 27 Beav. 181: *Knight* v. *Brown*, 9 W. R. 515: and see *Re Detmold*, 40 Ch. Div. 585.

(*g*) See Elph. Introd., 333; Dart, V. & P. 22; 2 K. & E. 428, note (*c*); 33 Sol. J. 767; 2 Vaizey on Settlements, 947.

(*h*) See as to the classes of debts, M. L. P. P. 171.

the debt (*i*), in which case the heir, and subsequently a devisee also (*k*), was liable to the value of the estate which he took by descent or under the will. Lands so rendered applicable to payment of debts were *legal* assets, and the liability was enforceable at law. But creditors by simple contract, or by specialty not binding the heirs, had no remedy against the deceased debtor's lands, unless he had by his will created a trust for payment of his debts, or a charge of debts on the lands; in which case the lands became *equitable* assets to be administered by the Court of Chancery; and that Court, on the principle that "equality is equity," treated all creditors as on an equal footing so far as regarded their equitable remedy against the lands subject to the trust or charge (*l*). In 1807 the lands of deceased *traders* were subjected to payment of their simple contract debts (*m*); and by the Administration of Estates Act, 1833 (*n*), it was enacted that the lands of all deceased persons, which they should not by will have charged with or devised subject to the payment of their debts, should be assets to be administered in Courts of Equity for the payment of their debts, as well on simple contract as on specialty; but creditors by specialty binding the heirs were to be paid in full before creditors by simple contract or by specialty not binding the heirs.

The distinction between creditors by "specialty" binding the heirs and other creditors of deceased persons, as to priority of payment, has been removed in respect of all persons dying on or after 1st January, 1870, by the Administration of Estates Act, 1869 (*o*) (commonly known as "Hinde Palmer's Act"). This statute applies to all assets whether legal or equitable, but it does not affect any lien, charge, or other security which any creditor may hold or be entitled to for the payment of his debts (*p*). In the case of any person dying insolvent, it is now

(*i*) 1 Cruise, Dig. 57; under the Conveyancing and Law of Property Act, 1881, a covenant, and a contract under seal, and a bond or obligation under seal, though not expressed to bind the heirs, are to operate in law to bind the heirs and real estate of the person making the same; 44 & 45 Vict. c. 41, s. 59.

(*k*) 3 Will. & M. c. 14, s. 2, made perpetual by 6 & 7 Will. III. c. 14.

(*l*) See Eddis on Administration.

(*m*) 47 Geo. III. c. 74.

(*n*) 3 & 4 Will. IV. c. 104; see Wms. R. P. 264; Shelford, R. P. Stat. 377.

(*o*) 32 & 33 Vict. c. 46. See *Re Jones*, 31 Ch. D. 440; *Re Bentinck*, [1897] 1 Ch. 673.

(*p*) Rent is a specialty debt within the meaning of the Act: *Shirreff* v. *Hastings*, 6 Ch. Div. 610. A specialty creditor has an advantage over a simple contract creditor with regard to the operation of the Statutes of Limitation: see *post*, Ch. XVI., and M. L. P. P. 174; and under 11 Geo. IV.

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provided by the Judicature Act, 1875 (*q*), that the same rules shall prevail as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, as may be in force for the time being under the Law of Bankruptcy with respect to the estates of persons adjudged bankrupt. That is to say, under the Bankruptcy Act, 1883 (*r*), (as under the Bankruptcy Act, 1869 (*s*)), a creditor holding a specific security on the property of the bankrupt may (1) simply rely on his security; or (2) he may give it up and prove for his whole debt; or (3) he may realize the security, or give credit for the estimated value, and prove in respect of the balance due to him. The old rule in equity, as established in *Mason* v. *Bogg* (*t*), was that a secured creditor might prove for his whole debt, realize his security, and receive a dividend rateably with the other creditors of the deceased on the whole debt, paying over any surplus he might receive beyond the amount of his debt.

At the present day, unless there is an express or implied charge for debts on the real estate of the testator, recourse must be had to the Chancery Division of the High Court, in order to make the real estate available as assets, or, when the estate does not exceed in value £500, it may be to the County Court within the district of which the deceased person had his last place of abode in England, or in which the executors or administrators, or any one of them, have their or his place of abode (*u*); but, if there is such charge, the devisee in trust, if any, of the whole interest of the testator in the estate, and if there is no such devisee in trust, the executor of the testator (*x*), may sell or mortgage for payment of debts.

Forfeiture.

Forfeiture for treason or felony which formerly took place on attainder (*y*) has been abolished by the Forfeiture Act, 1870 (*z*):

& 1 Will. IV. c. 47, the devisee or heir may be sued personally, and judgment obtained to the extent of the assets devolved. See *Re Hedgely*, 34 Ch. Div. 379; Shelford, R. P. Stat., pp. 365, *et seq.* See *In re Illidge*, 27 Ch. Div. 478, as to the right of retainer by heir or devisee in respect of a specialty debt.

(*q*) 38 & 39 Vict. c. 77, s. 10.

(*r*) 46 & 47 Vict. c. 52, s. 39, and Sched. ii. 9—17. See as to valuation of the security, *Ex parte Taylor*, 13 Q. B. D. 128, and *Ex parte Arden*, 14 Q. B. D. 121.

(*s*) 32 & 33 Vict. c. 71, s. 40.

(*t*) 2 My. & C. 443.

(*u*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 67 (1), and s. 75 (3).

(*x*) As provided by the Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), ss. 14—18: Shelford, R. P. Stat. 386.

(*y*) See Tud. L. C. R. P., note to *Att.-Gen.* v. *Sands*, and for the old law as to the alienation by traitors or felons, *ib.* 792. *Post*, Ch. XIV.

(*z*) 33 & 34 Vict. c. 23.

a convict, however, cannot alienate or charge any property (*a*). During sentence it may be placed in the hands of an administrator, to be appointed by the Crown, reverting only to the convict or his representatives on completion of sentence, pardon, or death. The administrator, however, has full power to alienate the property, or to cause payment or satisfaction of any debts or liabilities to be made out of it (*b*).

It remains to notice the personal incapacities, with regard to alienation, of (1) infants; (2) idiots and lunatics; and (3) married women (*c*).

Infants.

Infants, that is, persons under twenty-one years of age, cannot make any conveyance or disposition of their lands so as to be absolutely binding on themselves; such transactions are voidable by them at their pleasure on attaining full age, or, if they are dead, by their heirs (*d*).

Where, however, the lands have descended, or been devised to an infant, and are required to be sold or mortgaged for payment of debts, the infant can convey under the direction of the Court for the purpose of making a title to the purchaser or mortgagee in the same way as a tenant for life can, where the lands have been devised in settlement (*e*). Also by the Infants' Settlements Act, 1855 (*f*), a male infant of twenty, and a female of seventeen, can make a binding settlement on marriage, with the sanction of the Court, before or after the marriage (*g*); but it must be

Infants' Settlements Act.

(*a*) 33 & 34 Vict. c. 23, s. 8. This does not mean that he may not pay his debts, and he may be made bankrupt: see *Ex parte Graves*, 19 Ch. Div. 1.

(*b*) 33 & 34 Vict. c. 23, s. 9. See Dart, V. & P., pp. 15, 16; and as to trust and mortgage estates vested in the convict, 56 & 57 Vict. c. 53, s. 48.

(*c*) See as to these disabilities, Pollock on Contract, Ch. II., pp. 49, *et seq.* (6th ed.).

(*d*) But an infant of the age of 15 may convey his gavelkind lands by feoffment on sale, 2 Dav. Prec., Part I., 244, note. It was formerly said that an infant's conveyance is absolutely void, and not merely voidable (*i.e.*, valid until some act is done to avoid it; see, as to the distinction between void and voidable, Pollock on Contract, 6th ed., pp. 8, 52): but the law as stated in the text was laid down by Lord Mansfield in *Zouch* v. *Parsons* (3 Burr. 1794, 1804); and, notwithstanding the dissent of Mr. Butler (see his remarks in his edition of Shep. T. 232, 233) was approved by Sir E. Sugden when L.C. of Ireland, in *Allen* v. *Allen* (2 Dr. & War. 307, 338), where the subject is fully discussed. And see *Burnaby* v. *Equitable Revers. Socy.*, 28 Ch. Div. 416; *Clements* v. *L. & N. W. Ry. Co.*, [1894] 2 Q. B. 482; Simpson on Infants, 2nd ed., pp. 7, 9, 17, *et seq.* But it would seem that the conveyance may be absolutely void in a case where it is necessarily to the infant's prejudice, as for instance where it is voluntary, but we are not aware of any decision as to the effect of a voluntary conveyance by an infant.

(*e*) 11 Geo. IV. & 1 Will. IV. c. 47, s. 11; *ib.*, c. 65, ss. 12, 16, and 31; 2 & 3 Vict. c. 60: and 11 & 12 Vict. c. 87. See *ante*, p. 58.

(*f*) 18 & 19 Vict. c. 43.

(*g*) *In re Sampson and Wall*, 25 Ch. Div. 482: but the Court cannot compel the infant to make a settlement; *In re Leigh*, 40 Ch. Div. 290.

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remembered that the Act does not remove the disability arising from coverture; and that therefore, in cases not falling within the Married Women's Property Act, 1882 (*h*), a post-nuptial settlement by a woman may be ineffectual (*i*).

No will made by any person under the age of twenty-one is valid (*k*).

Conveyancing Act, 1881.

Under the Conveyancing and Law of Property Act, 1881, the High Court has power to sell the fee simple estate of an infant; for this is a consequence of the enactment (*l*) that land to which an infant is entitled in fee simple shall be deemed to be a settled estate within the Settled Estates Act, 1877. Previously the Court could not sell the fee simple estate of an infant merely because it might be for the infant's benefit to sell it (*m*); it could only sell such lands as came within the definition of "settled estates," under the Act of 1877. By virtue of the same enactment (*n*) the same powers of leasing are given to the Court and to the infant's guardians as are conferred by the Settled Estates Act, 1877, in respect of settled estates. A power of leasing infants' fee simple estates existed previously under the Infants' Property Act, 1830 (*o*), which is still in force (*p*).

Settled Land Act, 1882.

And now, as previously pointed out (*q*), under the Settled Land Act, 1882 (*r*), special provision is made that where an infant is absolutely entitled in possession to land, then, for the purposes of that Act, the land is settled land and the infant is to be deemed tenant for life thereof. And, whether he is thus deemed to be, or is in fact, tenant for life, the powers of a tenant for life under the Act may be exercised on his behalf by the trustees of the settlement, and, if there are none, then under the direction of the Court (*s*).

Lunatics.

Voluntary conveyances by idiots or lunatics (except during lucid intervals) are absolutely void (*t*); and such persons are, of course,

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(*h*) 45 & 46 Vict. c. 75.

(*i*) *Seaton* v. *Seaton*, 13 App. Cas. 61.

(*k*) Wills Act, 1837 (7 Will. IV. & 1 Vict. c. 26), s. 7.

(*l*) 44 & 45 Vict. c. 41, s. 41; and see ss. 42 and 43 as to management of the land during infancy and receipt and application of income.

(*m*) See Dart, V. & P., p. 2.

(*n*) 44 & 45 Vict. c. 41, s. 41.

(*o*) 11 Geo. IV. & 1 Will. IV. c. 65 See *In re Letchford*, 2 Ch. Div. 719.

(*p*) The powers of leasing given by this Act are, it is believed, available in some cases which are not provided for by the Settled Estates Act, 1877, or the Settled Land Acts.

(*q*) *Ante*, p. 58.

(*r*) 45 & 46 Vict. c. 38, s. 59.

(*s*) *Ib.* s. 60.

(*t*) *Elliot* v. *Ince*, 7 D. M. & G. 475.

incapable of disposing of property by will (*u*). But it appears to be now settled that a conveyance by an idiot or lunatic for valuable consideration is valid, if the purchaser had no notice of the idiotcy or lunacy (*x*); and that, even if he had such notice, the conveyance is not absolutely void, but is voidable by the lunatic's committee, or by his heirs after his death, or (probably) by himself if he recovers (*y*). Statutes, however, were passed (*z*), empowering the Lord Chancellor, or the committees of idiots and lunatics (*i.e.*, those to whom their charge has been committed) to execute instruments in their behalf, where loss or disadvantage would otherwise be sustained by their incapacity to execute for themselves. These statutes (known as the Lunacy Regulation Acts) have been repealed by the Lunacy Act, 1890 (*a*), which contains similar provisions.

Trustee Acts; Vesting Orders as to Infants and Lunatics.

Under the Trustee Act, 1893 (*b*), the Chancery Division of the High Court (*c*), in the case of infants, and under the Lunacy Act, 1890 (*d*), the Judge in Lunacy (*e*) in the case of lunatics, may by order, where an infant or lunatic is possessed of any lands upon trust, or by way of mortgage, vest them in such person and for such estate as the Court or the Judge in Lunacy, as the case may be, shall direct.

Married women.

With regard to the incapacity of married women to alienate land, we will first consider the law as to cases not falling within the Married Women's Property Act, 1882 (*f*).

(*u*) As to the tests of mental capacity and generally, see *Smith* v. *Tebbitt*, L. R. 1 P. & M. 398.

(*x*) *Elliot* v. *Ince*, 7 De G. M. & G. 475; *Molton* v. *Camroux*, 4 Ex. 17; see *per* Lord Esher, M.R., *Imperial Loan Co.* v. *Stone*, [1892] 1 Q. B. 599, at p. 601.

(*y*) See Dart, V. & P., p. 6; Pollock on Contract, 86, *et seq.*; M. L. P. P. 417.

(*z*) 16 & 17 Vict. c. 70; 18 & 19 Vict. c. 13; 25 & 26 Vict. c. 86; and 45 & 46 Vict. c. 82.

(*a*) 53 Vict. c. 5; see ss. 116, *et seq.*; and as to execution of assurances, s. 124.

(*b*) 56 & 57 Vict. c. 53, ss. 26, 28, 32, replacing similar provisions in the Trustee Act, 1850 (13 & 14 Vict. c. 60), and the Trustee Act, 1852 (15 & 16 Vict. c. 55).

(*c*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 34 (3).

(*d*) 53 Vict. c. 5 (s. 135), which Act repeals the former provisions as to lunatics contained in the Trustee Act, 1850, and the Trustee Act, 1852. As to applications, see Rules in Lunacy, 1892, Nos. 17, 57, 59, dated 6th February, 1892, in W. N., 1892.

(*e*) *Ib.* s. 108, which provides that "the jurisdiction of the Judge in Lunacy is to be exercised either by the Lord Chancellor for the time being entrusted by the Sign Manual of Her Majesty with the care and commitment of the custody of the persons and estates of lunatics, acting alone, or jointly with any one or more of such Judges of the Supreme Court as may for the time being be entrusted as aforesaid, or by any one or more of such Judges as aforesaid."

(*f*) 45 & 46 Vict. c. 75.

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Lord Mansfield, speaking of the Common Law as it then stood, said, in *Zouch* v. *Parsons* (*g*) :—

"The distinction between the deeds of *femes covert* and of infants is important; the first are void, the second voidable."

To understand the law on this subject as it stood before the Married Women's Property Act, 1882, it is necessary to explain the different interests which a married woman might have in lands held in fee simple :—(1) The legal estate in them might have been conveyed or devised or have descended to her in fee, in which case her husband became seised of them in her right; or (2) she might have an ordinary equitable estate, as when they have been conveyed or devised to trustees in fee in trust for her in fee, without any words creating a separate use : or (3) she might have that peculiar equitable estate called a "separate estate" (*h*), as when the lands had been conveyed or devised to trustees in fee for her separate use, or to herself direct in fee for her separate use (in which case the Court constituted her husband a trustee for her) (*i*).

Right of husband in freeholds of his wife.

At common law, by the marriage, the husband acquires a freehold interest during the joint lives (*k*) of himself and his wife in land belonging to her in fee simple (not for her separate use), and is entitled to its rents and profits, and that interest passes by the deed of the husband alone (*l*). The wife is under an absolute incapacity during coverture to dispose of such lands by will. By the 14th section of the Statute of Wills (*m*), it was enacted that wills or testaments, made of any manor, lands, tenements, or other hereditaments, by any woman covert should not be taken to be good or effectual in law; and the Wills Act, 1837 (*n*) made no difference in this respect (*o*).

Powers of disposition of husband and wife together.

At common law "a married woman by joining with her husband in levying a fine, might bar herself and her heirs of all her estate and interest in any lands whereof he was seised in her right" (*p*). It was, however, a consequence of a provision in

(*g*) 3 Burr., at p. 1805.

(*h*) As to separate estate, see *post*, p. 129, note (*k*).

(*i*) *Ashworth* v. *Outram*, 5 Ch. Div. 941.

(*k*) As to curtesy, see *post*, p. 141.

(*l*) *Robertson* v. *Norris*, 11 Q. B. 916; Elph. Introd., p. 295. As to the three ways in which her fee simple may be affected by a trust for her separate use, see *per* Fry, L.J., *Dye* v. *Dye*, 13 Q. B. D. 156.

(*m*) 34 & 35 Hen. VIII. c. 5.

(*n*) 7 Will. IV. & 1 Vict. c. 26.

(*o*) S. 8. See *Willock* v. *Noble*, L. R. 8 Ch. 778; L. R. 7 H. L. 580.

(*p*) See 5 Cruise, Dig., pp. 172, *et seq.*; Co. Litt. 121 a, Mr. Hargrave's note (1).

the statute, *De modo levandi fines* (*q*), that she must be separately examined to see that she assented to the fine (*r*). A recovery might also be employed as a means of conveying the estate of a *feme covert* (*s*); but in practice was only resorted to where an estate tail was to be barred (*t*). The operation of fines and recoveries upon the estates of a married woman was derived from the principle that she might at common law be joined as a co-defendant with her husband in an action at law (*u*).

In a recent case in the House of Lords (*x*), Lord Selborne, L.C., remarked:—

"The common law of this country, as to the disabilities of married women, was not (as I conceive) founded on any presumption against the spontaneity or freedom of acts done by the wife when under marital control; nor was it subject to exception whenever there might be circumstances sufficient to repel such a presumption. The principle of the disability of coverture was that stated by Littleton (s. 168): 'A man and his wife are but one person in the law,' which is the reason why 'a man cannot grant or give his tenements to his wife during the coverture;' and (as Lord Coke says in his comment on the same place) 'she is disabled to contract with any without the consent of her husband; *omnia quæ sunt uxoris, sunt ipsius viri.*' As to her personal property in possession, the husband had absolute power without any concurrence on her part, and also as to the administration and usufruct of her real estate. By personal contracts, either with him or with any other person she could in no way bind herself. Equity, in later times, through the medium of trusts, enabled her to acquire separate estate, and to deal with such separate estate as if she had been a *feme sole*, except when restrained from anticipation by the terms of the trust; in which case she continued under disability as to the *corpus* and future income of such property, though the *jus mariti* was excluded. . . . Although a married woman could not contract or convey property (not separate) except so far as by common or statute law she was enabled to join with her husband in doing so, she might always, when her interest required it, sue and be sued jointly with her husband, or (in equity) apart from her husband by a next friend. In respect of all interests which she had in the subject-matter of any such suit, she was bound as much as if she had been under no disability, by the powers of the Courts, and by the rules and principles of law and equity administered by them. Real estate, of which she or her husband in her right might be in possession, could be recovered against her as well as against her husband. . . . It was therefore a just corollary from her right to sue, and her liability to

(*q*) 18 Edw. I., stat. 4.

(*r*) 5 Cruise, Dig. 116; Challis, R. P. 361, 362.

(*s*) 4 Cruise, Dig. 128; 5 *ib.* 347.

(*t*) Challis, R. P. 362.

(*u*) Challis, R. P. 361; 5 Cruise, Dig. 116; *ib.* 172.

(*x*) *Cahill* v. *Cahill*, 8 App. Cas. 420; see pp. 425, 427; and see *May* v. *Roper*, 4 Sim. 360; *Forbes* v. *Adams*, 9 Sim. 462.

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be sued, in such a case, that she might elect, and be bound by her election, unless the nature of her interest in any property to be relinquished created some obstacle. . . . Another consequence of the *locus standi in curiâ* of a married woman for the purpose of asserting or defending her rights of property (whether with her husband or a next friend) and of having the rights of others asserted against her, was that her interests in the subject-matter of the litigation to which she was so made a party, might be bound by way of 'transaction' or compromise; and this has been in modern times extended to compromise out of, as well as in, Court. It was on this foundation that the forms of judicial assurance, by which freehold estates of married women were alienated at common law, down to the passing of the Act for the Abolition of Fines and Recoveries (*y*), originally rested" (*z*).

Fines and Recoveries Act —Conveyance by deed acknowledged.

The Fines and Recoveries Act, 1833 (*a*), enabled married women to convey by the method prescribed in the Act: but they have no power of alienation with respect to real estate (not separate) except such as is given by statute; and the power thereby given is conditional on its execution in the manner which the statute prescribes (*b*). The Act provides for the alienation of lands belonging to a married woman for a legal estate or an ordinary equitable estate not for her separate use (in which case equity follows the law). She can by virtue of the Act alienate such estates (*c*) *inter vivos* during coverture, but only with the concurrence of her husband, signified by his joining in the conveyance (*d*), and by deed duly acknowledged, *i.e.*, she must give her assent before a Judge of the superior Courts, or of a County Court, or (before 1883) two commissioners, or (after 1882) one commissioner, after separate examination as to her knowledge of what she is doing and her wish to do it (*e*).

Concurrence of husband and acknowledgment by wife.

Certificates of acknowledgment.

It was held that the Fines and Recoveries Act, 1833 (*f*) required that a certificate of the acknowledgment should be filed of record before any use could be made of the conveyance; that the meaning of the Act was that the certificate, when filed, should

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(*y*) 3 & 4 Will. IV. c. 74.

(*z*) See also the remarks of Lord Blackburn in the S. C. 8 App. Cas. at p. 438.

(*a*) 3 & 4 Will. IV. c. 74, ss. 77—91.

(*b*) *Per* Lord Selborne, 8 App. Cas. 428.

(*c*) A mere *spes successionis* (*ante*, p. 6, note (*w*)) is not an "estate" within the Act; *Allcard* v. *Walker*, [1896] 2 Ch. 369, 380.

(*d*) See form of conveyance in Dav. Conc. Prec., p. 107.

(*e*) The Fines and Recoveries Act, 1833 (3 & 4 Will. IV. c. 74), ss. 77, 79, 80; County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 184; Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 7. See as to the effect of acknowledgment and separate examination, *Tennent* v. *Welch*, 37 Ch. Div. 622.

(*f*) 3 & 4 Will. IV. c. 74, s. 86.

have relation back to the date of the acknowledgment, but that if the certificate were not filed, then the acknowledgment should not have any effect whatever (*g*). It has, however, been enacted by the Conveyancing Act, 1882 (*h*), that (as regards deeds executed by married women after 1882) where the memorandum of acknowledgment purports to be signed by a person authorized to take the acknowledgment, the deed shall, as regards the execution thereof by the married woman, take effect at the time of acknowledgment, and shall be conclusively taken to have been duly acknowledged. But a certificate must still be filed in the Supreme Court of the acknowledgment by a married woman of a deed executed before 1883, and an office copy of any certificate is to be received as evidence of the acknowledgment (*i*). Formerly, as we have seen, the mode of alienation by a married woman was by fine duly levied in the Court of Common Pleas, she being examined apart from her husband, to ascertain whether she joined in the fine of her own free will.

Conveyancing Act, 1882.

A married woman has the same power of disposition, by deed or will, over lands which are her separate estate, as if she were a *feme sole*, so far as relates to the equitable or beneficial interest therein. Lord Westbury, L.C., said:—

Alienation of separate estate.

"When the Courts of Equity established the doctrine of the separate use of a married woman, and applied it to both real and personal estate, it became necessary to give the married woman, with respect to such separate property, an independent personal status, and to make her in equity a *feme sole*. It is of the essence of the separate use that the married woman shall be independent of and free from the control and interference of her husband. With respect to separate property, the *feme covert* is, by the form of trust, released and freed from the fetters and disability of coverture, and invested with the rights and powers of a person who is *sui juris*. To every estate and interest held by a person who is *sui juris*, the common law attaches a right of alienation, and accordingly the right of a *feme covert* to dispose of her separate estate was recognized and admitted from the beginning, until Lord Thurlow devised the clause against anticipation. But it would be contrary to the whole principle of the doctrine of separate use, to require consent or concurrence of the husband in the act or instrument by which the wife's separate estate is dealt with or disposed of; that would be to make her subject to his control and interference. The whole lies between a married woman and her trustees: and the true theory of her alienation is, that any instrument, be it deed or writing, when signed by her, operates as

(*g*) *Jolly* v. *Handcock*, 7 Ex. 820; *Sharpe* v. *Foy*, L. R. 4 Ch. 35.

(*h*) 45 & 46 Vict. c. 39, s. 7.

(*i*) 45 & 46 Vict. c. 39, s. 7, §§ 6, 7.

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a direction to the trustees to convey or hold the estate according to the new trust which is created by such direction. This is sufficient to convey the *feme covert's* equitable interest; when the trust thus created is clothed by the trustees with the legal estate, the alienation is complete both at law and in equity" (*k*).

In the case just cited, the legal estate was in a trustee, and the remarks of Lord Westbury applied only to the wife's power over the equitable estate; for the wife's conveyance, even where she is entitled for her separate use (otherwise than under the Married Women's Property Act, 1882), does not affect the legal estate. If the legal estate is in trustees, they must join to convey it: if the husband is seised of it in right of his wife, the husband and wife must both be conveying parties, and the deed must be acknowledged by her to pass the legal estate (*l*).

Appointment by married woman.

Where real estate is limited to such uses as a married woman shall appoint, then, by a conveyance operating as an appointment of the use, she can convey alone by deed unacknowledged (*m*); or she can execute the power by will: and in such cases her appointment vests the legal estate in the appointee.

What is said as to legal and equitable estates will be clearer after we have dealt generally with such estates, and the distinction between them, and with uses and trusts (*n*).

Married Women's Property Act, 1882.

In cases where the wife is entitled by virtue of the Married Women's Property Act, 1882 (*o*), her conveyance operates to pass the legal estate as well as her beneficial interest; for the Act provides that a married woman shall, in accordance with the provisions of the Act, be capable of acquiring, holding, and disposing by will (*p*), or otherwise, of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee. And (*q*) that every woman married *after* 1882 shall be entitled to have and to hold as her separate property, and to dispose of in manner aforesaid,

(*k*) *Taylor* v. *Meads*, 4 De G. J. & S. 597, at p. 603.

(*l*) See 1 K. & E. 488, note (*d*).

(*m*) 2 Dav. Prec. i. 242.

(*n*) Ch. X., *post*.

(*o*) 45 & 46 Vict. c. 75, s. 1. See, as to the effect of this section, *Re Cuno*, *Mansfield* v. *Mansfield*, 43 Ch. Div. 12.

(*p*) It was held that this power did not enable her by a will made during coverture to dispose of property not acquired until after the death of her husband; see *Re Price*, *Stafford* v. *Stafford*, 28 Ch. Div. 709; but this decision is made obsolete by the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), s. 3; *In re Wylie*, [1895] 2 Ch. 116; see *post*, p. 398.

(*q*) S. 2. This applies to the power to enlarge a base fee into a fee simple absolute; *Re Drummond and Davie's Contract*, [1891] 1 Ch. 524.

all real and personal property which shall belong to her at marriage, or shall be acquired by or devolve upon her after marriage. Also (*r*), that every woman married *before* 1st January, 1883, shall be entitled to have and to hold, and to dispose of in manner aforesaid, as her separate property, all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue *after* 1882. But these provisions are not to "interfere with or affect any settlement," whether made before 1883 or after 1882 (*s*). The effect of these words appears to be that every binding settlement of the property of a married woman is to have the same effect as if the Act had not been passed (*t*). The above Act was passed to consolidate and amend the previous Acts relating to the property of married women—namely, the Married Women's Property Act, 1870, and the Amendment Act, 1874 (*u*). By the Act of 1870, it had been enacted (*x*) that when any freehold, copyhold, or customaryhold property should descend (*y*) upon any married woman after 9th August, 1870, as heiress, or co-heiress of an intestate, *the rents and profits* of such property should, subject and without prejudice to the trusts of any settlement affecting the same, belong to her for her separate use. The better opinion was, that that Act (unlike the Act of 1882) affected only the income of the property and not the fee simple (or *corpus*), and therefore that she had no power to dispose of it during coverture by will, or otherwise than by an acknowledged deed (*z*). It has been held that the Act of 1882 applies only

(*r*) 45 & 46 Vict. c. 75, s. 5.

(*s*) S. 19.

(*t*) *Hancock* v. *Hancock*, 38 Ch. Div. 78; see *Stevens* v. *Trevor-Garrick*, [1893] 2 Ch. 307; Elph. Introd., 300. Where the marriage was before 1883, the husband on marriage became entitled to the rents and profits of the wife's freeholds during their joint lives, on the birth of any issue who could by any possibility inherit he became tenant by the curtesy, and according to the custom of most manors he took similar interests in his wife's copyholds; and he became entitled to, or to dispose of, his wife's personalty with some exceptions, and therefore a settlement by him alone bound the wife to the extent of the interests taken by him, or which he could dispose of. If the decision in *Stevens* v. *Trevor-Garrick*, [1893] 2 Ch. 307, is upheld, a settlement by the husband alone, at the present day, will have the same effect as before 1883 and thus prevent the wife from exercising the rights of holding and disposing of property conferred on her by the Married Women's Property Act, 1882.

(*u*) 33 & 34 Vict. c. 93, and 37 & 38 Vict. c. 50.

(*x*) 33 & 34 Vict. c. 93, s. 8.

(*y*) Observe that the Act does not apply to lands *devised* to her, but only to those which she takes under an intestacy.

(*z*) *Johnson* v. *Johnson*, 35 Ch. Div. 345; 2 Dav. Proc. i. 268. As to the different laws now applicable to a married woman, and the effect of the M. W. P. Act, 1882, see W. B. & C., pp. 245, *et seq.*; they point out (p. 249), that the Act

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Trust property.

to property to which the married woman is beneficially entitled, and not to that which she holds as a trustee (*a*).

By the Married Women's Property Act, 1882 (*b*), provision is made more fully than in the Act of 1870 (*c*), for any question between husband and wife as to the title to or possession of property being decided by application in a summary way to a Judge of the High Court, or, at the option of the applicant, to the Judge of the County Court of the district in which either party resides. Also, it is provided (*d*), that every married woman shall have in her own name against all persons, including her husband, the same civil remedies, and also (with some restriction as regards her husband) the same remedies and redress, by way of criminal proceedings, for the protection and security of her own separate property as if it belonged to her as a *feme sole* (*e*).

Restraint on anticipation.

In order to protect the wife against the influence and persuasion of her husband to exercise her unfettered power of disposition over her separate estate in his favour, and otherwise to preserve the benefit to her, in instruments conferring a separate estate or interest on a married woman, a clause is often introduced restraining during coverture her power of alienation, or anticipation of the income. This was first done by Lord Thurlow at the end of the last century, upon the theory that equity, making her the owner and enabling her as a married woman to alien, might limit her power (*f*); and since that time it has been usual to introduce into wills and settlements a clause giving to women (*g*) real and personal estate for their separate use independently of their husbands, without power of assignment by way of anticipation or of aliena-

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affords no assistance in the disposition by a woman married before 1883 of property acquired by her before that year. See also 1 K. & E., pp. 486, note (*b*).

(*a*) *Re Harkness and Allsopp*, [1896] 2 Ch. 358. See *post*, p. 131, as to land held by a married woman as "bare trustee."

(*b*) 45 & 46 Vict. c. 75, s. 17.

(*c*) 33 & 34 Vict. c. 93, s. 9.

(*d*) 45 & 46 Vict. c. 75, s. 12.

(*e*) As to whether the wife has a right to exclude her husband from her house, which is her separate property, see *Symonds* v. *Hallett*, 24 Ch. Div. 346. She can sue a stranger for trespass, *Weldon* v. *De Bathe*, 14 Q. B. D. 339.

(*f*) *Brandon* v. *Robinson*, 18 Ves. 434, and *Tullett* v. *Armstrong*, 1 Beav. 22, *per* Lord Langdale, M.R.; on appeal, Lord Cottenham, L.C., 4 M. & Cr. 377. See *Hood-Barrs* v. *Heriot*, [1896] A. C. 174, where it was held that the restraint does not apply to income accrued due.

(*g*) Whether at the time married or not; for though trusts for separate use and the restraint on alienation, &c., would have no effect before marriage, yet they come into operation upon marriage, and exist during the coverture (*Tullett* v. *Armstrong*, 1 Beav. 1; and see *Hawkes* v. *Hubback*, L. R. 11 Eq. 5. "The restraint is annexed to the separate estate

tion (*h*); the effect of which is that nothing done or omitted to be done by the married woman at any given time deprives her of the right to receive from the trustees the next and every succeeding payment of the income as it becomes due (*k*). It is provided by the Married Women's Property Act, 1882 (*l*), that no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself, shall have any validity against debts contracted by her before marriage (*m*). It has been held that the restriction does not extend to prevent a married woman, equitable tenant in tail for her separate use of freehold lands, "without power of alienation or anticipation" (*n*), from barring the entail with the concurrence of her husband, and limiting the property in fee to her separate use (*o*). It was argued, in the case referred to, that the restraint attached to the whole estate of the woman; but it was decided that there was no restraint except as regarded the income of her life estate. But, assuming that the argument

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only, and the separate estate has its existence only during coverture: whilst the woman is discovert, the separate use, whether modified by restraint or not, is superseded and has no operation, though it is capable of arising on the happening of a marriage. The restriction cannot be considered distinctly from the separate estate of which it is only a modification;" *Woodmeston* v. *Walker*, 2 R. & M. 197.

(*h*) Lord Langdale, *Tullett* v. *Armstrong*, 1 Beav. 22.

(*k*) *Per* Fry, L.J., *Re Vardon's Trusts*, 31 Ch. Div., at 280. The restraint may apply not only to a life interest, but to a separate interest given to a married woman absolutely, see *per* Cotton, L.J., *In re Bown*, 27 Ch. Div. 422; and see *Re Currey*, *Gibson* v. *Way*, 32 Ch. Div. 361. See generally on the subject of married women's separate estate, *Hulme* v. *Tenant*, 1 W. & T.; as to its history, see Haynes' Outlines of Equity, Lect. vii.; and see form, 3 Dav. Prec. ii. 798, or 2 Prid. 301; and as to the words to create it, other than "separate," which has *per se* a technical signification, see Elph. N. & C., Interp. 296; 1 Vaizey on Settlements, 754. The words must shew the intention to secure the property against the control of the husband and to give to the wife the sole and absolute disposition; see *Massy* v. *Rowen*, L. R. 4 H. of L. 288. It is competent to a woman while discovert to abrogate the prospective restraint; *Wright* v. *Wright*, 2 J. & H. 647.

(*l*) 45 & 46 Vict. c. 75, s. 19.

(*m*) See as to cases under the M. W. P. Act of 1870, *London and Provincial Bank* v. *Bogle*, 7 Ch. Div. 773; *Axford* v. *Reid*, 22 Q. B. D. 548; and as to the Act of 1882, *Jay* v. *Robinson*, 25 Q. B. D. 467.

(*n*) See *In re Bown*, *O'Halloran* v. *King*, 27 Ch. Div. 411, 414, where Kay, J., said: "A clause restraining anticipation is construed as meaning that the married woman shall not assign her interest; whether the words are without any power of 'alienation' or of 'anticipation,' the effect is the same;" and this was cited with approval by Chitty, J., in *Re Currey*, *Gibson* v. *Way*, 32 Ch. Div. 361, 365.

(*o*) *Cooper* v. *Macdonald*, 7 Ch. Div. 288.

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was right, and that the fetter was on the whole estate, Jessel, M.R., said in *Cooper* v. *Macdonald* (*p*):—

"What is the meaning of the fetter? The meaning is exactly that which was expressed by the old common form of conveyancers, 'so as in nowise to deprive herself of the benefit thereof by way of anticipation.' The meaning was to give the actual enjoyment to the married woman for her own benefit, not for the benefit of anybody else; and it is absurd, it appears to me, to extend such an equitable provision as this so as to prevent a married woman enlarging the estate tail into an estate in fee simple for her own benefit. That is not an alienation so as to deprive herself of anything; it is not, strictly speaking, perhaps, an alienation at all, except in a very wide sense of the term. It is, strictly speaking, what is always called an enlargement of the estate. The mode in which it is done is by a conveyance which is called an alienation, but it is really nothing more than making that estate already given to the married woman indefeasible. If that is so—and all the clauses or fetters on alienation, if applying to the estate tail, would equally apply to the pure fee simple—why should I construe that clause against anticipation, which was invented by a Lord Chancellor for the benefit of a married woman, to her damage and injury?

"It appears to me that would be a wrong construction, and altogether opposed to principle. That would amount to saying that that clause which was intended to give her the full benefit of the property is to deprive her of the right of extending that benefit in her own favour, and I entirely decline so to construe the clause against my own views, had it been even more extensive than it appears to me to be in this will."

Conveyancing Act, 1881.

Now under the Conveyancing and Law of Property Act, 1881, notwithstanding that a married woman is restrained from anticipation, the High Court may, if it thinks fit, where it appears to the Court to be for her benefit, by judgment or order with her consent, bind her interest in any property (*q*). It had before this Act been held that the Court had no power to interfere—*e.g.*, where a testator gave a legacy to a married woman upon condition that she should give up an estate devised to her by another testator for her separate use, with a clause against anticipation—though to have done so would have been greatly to her benefit (*r*).

(*p*) *Cooper* v. *Macdonald*, 7 Ch. Div. 288.

(*q*) 44 & 45 Vict. c. 41, s. 39; and see *Hodges* v. *Hodges*, 20 Ch. Div. 749; *Re Little*, 40 Ch. Div. 418; *Re Pollard*, [1896] 2 Ch. 552; and the cases collected in W. B. & C., note on s. 39. Under the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 45, which gives statutory effect to a jurisdiction which has long been exercised by the Court of Chancery (*Bolton* v. *Curre*, [1895] 1 Ch. 544), the Court can, as an indemnity to the trustee, impound the interest of a married woman restrained from anticipation who has instigated a breach of trust, and under the M. W. P. Act, 1893 (56 & 57 Vict. c. 63), s. 2, in any proceeding instituted by a married woman the Court may order the costs to be paid out of property subject to a restraint on anticipation.

(*r*) *Robinson* v. *Wheelwright*, 6 De Gex M. & G. 535. As to the effect of

Settled Land Act, 1892.

It has been mentioned before (*s*), that special provision has been made by the Settled Land Act, 1882 (*t*), for the case of a married woman being tenant for life within the meaning of that Act. The meaning of "separate estate" and "restraint on anticipation" having been now explained, the details of that provision will be more readily understood. It enacts that "where a married woman who, if she had not been a married woman, would have been a tenant for life, or would have had the powers of a tenant for life" under the Act, "is entitled for her separate use, or is entitled, under any statute, passed or to be passed, for her separate property, or as a *feme sole*, then she, without her husband, shall have the powers of a tenant for life" under the Settled Land Act; and where she is entitled otherwise, she and her husband together are to have such powers. And she may execute all deeds, instruments and things necessary or proper for giving effect to the provisions of the section; and a restraint on anticipation is not to prevent the exercise by her of any power conferred on her by the Act.

Vendor and Purchaser Act, 1874.

By the Vendor and Purchaser Act, 1874, it was provided that where any freehold or copyhold hereditament should be vested in a married woman as a bare trustee, she might convey the same as if she were a *feme sole* (*u*); and this provision is now replaced by sect. 16 of the Trustee Act, 1893 (*x*).

Liability to engagements.

In equity a married woman's separate estate (that is, such separate estate, not subject to restraint on anticipation (*y*), as she had at the time of contracting the engagement) could be made liable to her general engagements (including tradesmen's bills, &c.), made in reference to and on the faith or credit of that estate whether the reference to her separate estate was express or merely implied from the circumstances being such as to lead to the conclusion that she was contracting not for her husband but for herself in respect of her separate estate (*z*). But it was held that her engagements could not be enforced against separate estate to which she became entitled subsequently to such engage-

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restraint upon alienation in regard to the equitable doctrine of election, see *In re Wheatley*, 27 Ch. Div. 606, and *In re Vardon's Trusts*, 31 Ch. Div. 275.

(*s*) *Ante*, p. 58.

(*t*) 45 & 46 Vict. c. 38, s. 61.

(*u*) 37 & 38 Vict. c. 78, s. 6; *Re Docwra*, 29 Ch. Div. 693.

(*x*) 56 & 57 Vict. c. 53, s. 16.

(*y*) As to liability of property subject to a restraint, see *ante*, p. 129.

(*z*) *Per* Kindersley, V.-C., in *Matthewman's Case*, L. R. 3 Eq. 787.

ments(*a*). But not even in equity could her separate estate be made liable for a tort or a breach of trust; thus where a woman in whom the legal estate in a rent charge was vested in trust to apply the rent for the benefit of another person, married, and afterwards applied it wrongfully to other purposes, it was ineffectually sought to charge her separate estate with the amount so misapplied(*b*).

It was enacted by the Married Women's Property Act, 1882(*c*), that a married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract (which includes the acceptance of any trust, and the liability extends to any breach of trust(*d*), and of suing and being sued either in contract or in tort(*e*) or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined as a party; and any damages or costs recovered against her shall be payable out of her separate property. The Act further provided(*f*) that every contract entered into by a married woman shall be deemed to be a contract with respect to and to bind her separate property(*g*), unless the contrary be shown; and that(*h*) every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire.

The construction put upon the above-mentioned Act was that to enable a woman to bind separate property subsequently acquired it was necessary that she should have had at least some separate property at the date of the contract(*i*). But by the Married Women's Property Act, 1893(*k*) it was provided that (sect. 1):—

> "Every contract hereafter" (*i.e.*, after 4th December, 1893) "entered into by a married woman otherwise than as agent

(*a*) *Pike* v. *Fitzgibbon*, 17 Ch. Div. 454; *King* v. *Lucas*, 23 Ch. Div. 724.

(*b*) *Wainford* v. *Heyl*, L. R. 20 Eq. 321.

(*c*) 45 & 46 Vict. c. 75, s. 1 (2).

(*d*) S. 24; 35 Sol. J. 341, 359.

(*e*) For a discussion of the law as to contracts and torts of a married woman both before and since the Act the reader is referred to *Scott* v. *Morley*, 20 Q. B. D. 120 (where see the form of judgment); *Beck* v. *Pierce*, 23 Q. B. D. 316. The husband is still liable for the torts of his wife: *Seroka* v. *Kattenbury*, 17 Q. B. D. 177.

(*f*) S. 1 (3).

(*g*) This means property as to which she might reasonably be deemed to have contracted: *Leak* v. *Driffield*, 24 Q. B. D. 98.

(*h*) S. 1 (4).

(*i*) *Re Shakespear*, 30 Ch. Div. 169: *Re Palliser* v. *Gurney*, 19 Q. B. D. 519; and see *Stogdon* v. *Lee*, [1891] 1 Q. B. 661.

(*k*) 56 & 57 Vict. c. 63, s. 1.

(*a*) Shall be deemed to be a contract entered into by her with respect to and to bind her separate property, whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract;

(*b*) Shall bind all separate property which she may at that time or thereafter be possessed of or entitled to."

And by the same Act sub-sections 3 and 4 of s. 1 of the Married Women's Property Act, 1882, were repealed.

A creditor can obtain a judgment against the separate estate and can then obtain payment out of it; but where he has no such judgment he cannot interfere to prevent the woman from dealing with her property (*l*). The notion at one time prevailing that the engagements of a married woman were in the nature of charges on her separate estate was erroneous (*m*). Every married woman carrying on a trade separately from her husband is, in respect of her separate property, subject to the bankruptcy laws in the same way as if she were a *feme sole* (*n*).

Clergy.

To complete this branch of the subject—namely, the power of certain persons to alienate—it should be added that beneficed clergymen, who, as we have seen (*o*), Lord Coke says, have a qualified fee simple in their livings, cannot charge even against themselves the fruits of their livings or any part of them (*p*). But the profits of a benefice may be applied to the satisfaction of the debt of a judgment creditor of the clergyman, by means of a writ of *fieri facias de bonis ecclesiasticis*, or a writ of sequestration—modes of execution for debt (*q*). The statutes now regulating this are the Sequestration Acts, 1849 and 1871 (*r*).

Descent.

It only remains to be added that, in the absence of testamentary disposition, an estate in fee simple descends, upon the death of its owner, to the owner's real representative or heir, subject, in the case of a man, to his widow's right to dower, that is, an estate during her life in a third of his lands, and to her rights under the Intestates' Estates Act, 1890 (*s*); and in the case

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(*l*) *Robinson* v. *Pickering*, 16 Ch. Div. 660.

(*m*) *Owens* v. *Dickenson*, Cr. & Ph. 48.

(*n*) M. W. P. Act, 1882, s. 1 (5); *Re Dagnall*, [1896] 2 Q. B. 407.

(*o*) *Ante*, p. 85.

(*p*) *Hawkins* v. *Gathercole*, 6 De G. M. & G. 1; Wms. R. P. 82.

(*q*) See R. S. C. Order XLIII. rr. 3—5; and the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 52; Chitty's Archbold's Practice of the Queen's Bench Division, Ch. CIII.; Anderson on the Law of Execution, pp. 428, *et seq.*; and *post*, p. 384.

(*r*) 12 & 13 Vict. c. 67; 34 & 35 Vict. c. 45.

(*s*) 53 & 54 Vict. c. 29. See *post*, p. 141.

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of a woman, to her husband's right, in certain cases, to an estate during his life, called an estate by the curtesy, in the whole of the lands to which she was entitled for an estate of inheritance.

Of these interests, however, we reserve the consideration for the next chapter.

CHAPTER V.

DESCENT OR DEVOLUTION OF FREEHOLDS OF INHERITANCE, AND HEREIN OF DOWER AND CURTESY.

Devolution on death.

On the death of the owner of an estate of inheritance in land held in severalty or in common (*a*) the estate devolves, if it be an estate in fee simple, on the heir or devisee; if it be an estate tail, on the heir in tail; subject (whether it be an estate in fee simple or in tail), in some cases to the rights of the surviving wife or husband of the deceased owner.

The rights of the widow, which are conferred by the Common law (*b*), modified in the case of women married after the 1st January, 1834, by the Dower Act, 1833 (*c*), are called "dower." If the owner of an estate in fee simple died after the 1st September, 1890, his widow may also be entitled to certain rights under the Intestates' Estates Act, 1890 (*d*). The rights of a surviving husband, which are conferred by the Common law (*e*), are called "Tenancy by the Curtesy of England."

Dower.

Dower is the right of the widow to the enjoyment for her life of a portion of the real estate of which her husband was solely seised for an estate of inheritance in possession. She is entitled to have this portion, if it consist of corporeal hereditaments, *i.e.*, land, specifically set out by metes and bounds and assigned to her, unless her husband was seised in common with others, in which case she cannot be endowed by metes and bounds (*f*), but her dower is assigned to her in common; for the "dowress," as the widow is called, being in *pro tanto* of her husband's estate, cannot have it in other manner than he himself had (*g*).

(*a*) As to the meaning of the terms "severalty" and "in common," and as to the devolution in the case of joint tenancy, see *post*, Ch. IX.

(*b*) Co. Litt. 30 b.

(*c*) 3 & 4 Will. IV. c. 105. See Shelford, R. P. Stat. 340, *et seq.*

(*d*) 53 & 54 Vict. c. 29, *post*, p. 141.

(*e*) Co. Litt. 29 a.

(*f*) See 1 Cruise, Dig. Tit. vi., p. 151; Challis, R. P. 317; and as to the history of the law of Dower, see Digby, R. P., pp. 126, *et seq.*; P. & M. Hist. ii. 418.

(*g*) See, as to assignment of dower, 1

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One-third except in gavelkind.

The part which the Common law assigns to her is one-third; but in gavelkind lands she takes a moiety. By Magna Charta, it was provided that the widow should remain in her husband's capital mansion house for forty days after his death, during which time her dower should be assigned (*h*). These forty days were called the widow's "quarentine" (*i*).

"Dower was," says Blackstone (*k*), "formerly forfeitable by incontinency or a second marriage. By the famous charter of Henry I., this condition of widowhood and chastity was only required in case the husband left any issue, and afterwards we hear no more of it."

"Free bench."

In gavelkind lands, however, the right to dower (formerly called "free bench") is still subject to the condition of the widow remaining chaste and unmarried (*l*).

Attaches only on estates in possession.

The right to dower attaches only on an estate of inheritance (*m*), to which issue of the wife by the husband might by possibility inherit (*n*), and of which the husband was seised in possession (or seised subject only to a term of years) (*o*), as distinguished from one to which he was entitled in remainder or reversion expectant on an estate of freehold; but the right attaches even though he had only seisin in law (*p*) as distinguished from seisin in deed, *i.e.*, actual seisin. Seisin in law is the right to seisin of an heir, remainderman, or reversioner on whom an estate devolves by the death of the ancestor or by the determination of a particular estate in possession (*q*) before he has actually acquired seisin, in the case of land by entry, or in the case of incorporeal hereditaments by doing an appropriate act of ownership, as by receiving a rent charge, provided that no other person has acquired seisin in deed. Where the land is in the possession of a tenant for years, the freeholder cannot enter; but the possession of the tenant for years is considered to be the possession of the freeholder, and therefore the heir,

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Cruise, Dig. 168; and for form of decree in action for dower, see 2 Seton on Decrees, 805.

(*h*) See the clause set out in Digby, R. P. 128.

(*i*) 2 Bl. 135; 2nd Inst. 16; Digby, R. P. 128.

(*k*) 2 Bl. 133.

(*l*) Prerogativa Regis, 17 Edwd. II., stat. 1, c. 16, Robinson on Gavelkind, 160; see, as to "free bench" in copyholds, *post*, p. 327.

(*m*) Including an estate tail; 1st Inst. ss. 36, 53; Co. Litt. 40 a; 1 Cruise, Dig. 161.

(*n*) But it is not necessary that any such issue should have been born; Litt. s. 36.

(*o*) 1 Cruise, Dig. 162. For seisin is unaffected by the existence of a term of years; Challis, R. P. 89.

(*p*) As to seisin in law, see Challis, R. P. 207; 1 Cruise, Dig. 49, 50; Co. Litt. 266 b.

(*q*) See Ch. VIII., p. 229.

remainderman, or reversioner acquires seisin in deed of all lands in the hands of a tenant for years, without taking any steps to assert it (*r*).

If the widow was married before the 2nd January, 1834, she was entitled to dower only where the husband had the legal estate; but a widow who was married after the 1st January, 1834, is entitled to dower whether his estate was legal or equitable (*s*).

The husband's estate must have been held in severalty or in common, and not in joint tenancy, for reasons which will appear when we discuss these forms of ownership (*t*).

Only to wife at tenant's death.

The existence of a right to dower is conditional on the widow having been the wife of the tenant at his death. A divorce *a vinculo matrimonii*, that is, involving a dissolution of the marriage itself, extinguishes the right; but a mere judicial separation, or divorce "*a mensâ et thoro*" (*u*) does not. Under the Common law, even adultery would not destroy the right; though under the Statute of Westminster the Second (*x*), were the wife to elope from her husband—that is, leave his house and live with the adulterer—she would lose her dower, unless the husband were subsequently reconciled to her (*y*). It has been held that where a decree for dissolution of the marriage has been made under the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85; commonly called the Divorce Act), though obtained on the petition of the wife against the husband on the ground of his misconduct, the right to dower ceases (*z*).

Possibility of issue inheritable (*a*).

The right to dower only attaches on real estate which might possibly be inherited by any issue which the wife might have, whether any such issue were in fact born or not. Therefore, says Blackstone (*b*):—

"If a man seised in fee simple hath a son by his first wife, and after marries a second wife, she shall be endowed of his lands; for her issue might by possibility have been heir, on the death of the son by the former wife. But if there be a donee in special tail, who holds lands to him and the heirs of his body begotten on Jane his wife; though Jane

(*r*) Co. Litt. 15 a; *Bushby* v. *Dixon*, 3 B. & C. 298.

(*s*) The Dower Act, 1833 (3 & 4 Will. IV. c. 105), s. 2.

(*t*) *Post*, Ch. IX.

(*u*) Co. Litt. 33 b.

(*x*) 13 Edwd. I. c. 34; Co. Litt. 32 a.

(*y*) *Woodward* v. *Dowse*, 10 C. B. (N.S.) 722, and *Bostock* v. *Smith*, 34 Beav. 57; 1 Cruise, Dig. 175.

(*z*) *Frampton* v. *Stephens*, 21 Ch. Div. 164.

(*a*) Co. Litt. 49 a.

(*b*) 2 Bl. 131.

may be endowed of these lands, yet, if Jane dies, and he marries a second wife, that second wife shall never be endowed of the lands entailed: for no issue, that she could have, could by any possibility inherit them."

And says Lord Coke (*c*):—

"Albeit the wife be a hundred years old, or that the husband at his death was but four or seven years old, so as she had no possibility to have issue by him, yet seeing the law saith, that if the wife be above the age of nine years at the death of her husband she shall be endowed, and that women in ancient times have had children at that age, whereunto no woman doth now attain, the law cannot judge that impossible, which by nature was possible. And in my time, a woman above three score years old hath had a child."

Difficulty in way of defeating right.

The right to dower of a widow married before the 2nd January, 1834, attached on the estate contemporaneously with the acquisition of seisin, either in deed or in law, by the husband; and prevailed against any alienation or charge by the husband, whether by conveyance on sale or otherwise in his lifetime, unless the wife confirmed it by fine or recovery (*d*), and against his testamentary disposition; and was paramount to the claims of his creditors. The difficulty to which this led, particularly in the case of a sale of the lands by the husband in his lifetime, called forth the ingenuity of conveyancers in framing forms of conveyance adapted, on the occasion of the purchase by the husband, to exclude the right of dower. Several methods were devised (*e*), which were ultimately in practice superseded by that known as the conveyance "to uses to bar dower," which will be presently explained (*f*).

Right of dower, how defeated under the Dower Act.

The right to dower of a woman married after the 1st January, 1834, may be defeated, as to the whole or any part of the husband's lands, by a declaration in the deed of conveyance to him, or in any deed executed by him, that his widow shall not be entitled to dower out of such lands (*g*); or by a declaration in his will as to any land of which he dies wholly or partially intestate, that she shall not be entitled to dower out of such land, or out of any of his land (*h*); or by any absolute disposition in his lifetime, or by his will, as to any land so disposed of (*i*);

(*c*) Co. Litt. 40 a.
(*d*) 3 & 4 Will. IV. c. 74. See *ante*, p. 71.
(*e*) See Wms. R. P. 302, and *post*, p. 139.
(*f*) *Post*, Ch. XI., p. 301.
(*g*) 3 & 4 Will. IV. c. 105, s. 6.
(*h*) *Ib.* s. 7.
(*i*) *Ib.* s. 4.

and, unless a contrary intention be declared in the will, if the husband devise any land, or any estate or interest therein, by his will to or for the benefit of his widow, out of which land she would otherwise be entitled to dower, she is not to be entitled to dower out of any land of her husband (*k*); and all partial estates and interests and all charges created by any disposition or will of a husband, and all debts, incumbrances, contracts and engagements to which his land is subject or liable, prevail against the widow's right to dower (*l*). Such is the law in respect of all cases falling within the Dower Act, 1833. That Act applies to all widows whose marriage dates subsequently to the 1st January, 1834 (*m*).

Effect of Dower Act.

"The effect of the Act," Mr. Williams says (*n*), "is evidently to deprive the wife of her dower, except as against her husband's heir-at-law. If the husband should die intestate, and possessed of any lands, the wife's dower out of such lands is still left to her for her support, unless indeed the husband should have executed a declaration to the contrary."

And he deprecates what after the Act became a common practice, namely, putting a declaration against dower as a common form in purchase deeds.

Where there are no children and the widow is consequently entitled to the charge of £500 imposed on the intestate husband's estate by the Intestates' Estates Act, 1890 (*o*), her dower is reduced to the extent of the proportion of the real estate which is required to satisfy the charge (*p*).

How otherwise defeated.

Jointure.

The wife's right to dower may be also barred by a legal jointure settled upon the wife before marriage in substitution for her dower; if settled after marriage, she has her election after her husband's death between jointure and dower. A jointure is defined by Sir Edward Coke (*q*) to be "a competent livelihood of freehold for the wife of lands or tenements, &c., to take effect

(*k*) *Ib.* s. 9. See *Re Thomas, Thomas* v. *Howell*, 34 Ch. Div. 166, where a gift of the income of part of the proceeds of sale of the husband's land was held to deprive the widow of dower.

(*l*) *Ib.* s. 5.

(*m*) *Ib.* s. 14, excepting from the Act women married "*on* or before" 1st Jan., 1834.

(*n*) R. P. 304.

(*o*) 53 & 54 Vict. c. 29; see *post*, p. 141.

(*p*) *Re Charriere*, [1896] 1 Ch. 912.

(*q*) Co. Litt. 36 b. See, as to Jointure, *Re De Hoghton*, [1896] 2 Ch. 385, and authorities there cited by Stirling, J.; Bac. Abr., Dower and Jointure, G.; 1 Cruise, Dig. Tit. vii., p. 187, and notes in Shelf. R. P. Stat., p. 341, to s. 1 of the Dower Act, 1833.

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presently in possession or profit after the decease of her husband, for the life of the wife at the least"—that is, it must not be *pur autre vie*, or for a term of years or other smaller estate; hence it is a freehold. It was called a jointure, because, before the Statute of Uses (*r*), it was usual on marriage to settle by deed some special estate to the use of the husband and wife for their lives in joint tenancy, or "jointure;" which settlement would be a provision for the wife in case she survived her husband (*s*). Before that statute the husband had no legal seisin but only an equitable estate in such lands as were vested in another to his "use;" and therefore the widow was not dowable out of them, for before the Dower Act, 1833, dower did not attach except upon lands of which he was seised at law; but, as will presently appear, by reason of the Statute of Uses he acquired a legal seisin, and therefore the widow would have been entitled to dower out of them, and at the same time would have remained entitled to any lands that might be settled by way of jointure, had not the Statute of Uses provided also that, upon the husband making such estate in jointure to the wife before marriage, she should be precluded from dower (*t*). In addition to this legal bar of dower, there may be an equitable bar, the ground of which is contract; as when the wife has, being of full age, before marriage, agreed to take something else in lieu of dower, as, for example, a provision out of the personal estate; then she will be restrained in equity from setting up a claim to dower. The Court disregards the nature of the property and the *quantum;* and the only question in such cases is whether the provision alleged to have been given in satisfaction of dower was so given or not; whether that was part of the contract (*u*).

Equitable bar by contract.

Power to lease.

It remains to be added, that under the Settled Estates Act, 1877 (*x*), the tenant in dower entitled to the possession or receipt

(*r*) 27 Hen. VIII. c. 10.

(*s*) See Digby, R. P. 329, 350, note.

(*t*) 27 Hen. VIII. c. 10, s. 4: see this clause in 1 Cruise, Dig. 188, and in Digby, R. P. 349, 350; 2 Bl. 137; and see 3 Dav. Prec. i. 310. For the modern form of limitation of a jointure, see Dav. Conc. Prec. 489: "To the use that if the said B. (wife) shall survive the said A. (husband), she and her assigns may thenceforth receive during her life the yearly rent-charge of £— by way of jointure and in bar of dower, to be charged upon all the said premises." And see the form in 2 K. & E. 550.

(*u*) *Dyke* v. *Rendall*, 2 De G. M. & G. 209, at p. 218, *per* Lord St. Leonards.

(*x*) 40 & 41 Vict. c. 18, s. 46 (which re-enacts with slight alterations 19 & 20 Vict. c. 120, s. 32). See, as to leases under this section, *Davies* v. *Davies*, 38 Ch. Div. 499.

of rents and profits may lease the lands, except the principal mansion house and the demesnes thereof and other lands usually occupied therewith, for any term not exceeding twenty-one years. A tenant in dower is not included among the persons upon whom the Settled Land Act, 1882 (*y*), confers the powers of a tenant for life under that Act.

Intestates' Estates Act, 1890.

The Intestates' Estates Act, 1890 (*z*), provides that where a man dies after the 1st September, 1890, intestate, leaving a widow but no issue, the whole of his estate, both real and personal, where the net value thereof does not exceed £500, shall belong to his widow; and that, where that value exceeds £500, she shall have a charge on his estate, to be apportioned between his real and personal estate according to their values, of £500, with interest as from his death at 4 per cent. per annum, until payment; and that such charge is to be in addition and without prejudice to her rights on the residue of his estate, so that she will be entitled to dower in the real estate of which he died seised for an estate of inheritance, subject to an apportioned part of the charge (*a*).

Curtesy (*b*).

In the whole of the lands—except in gavelkind.

For life—except in gavelkind.

Tenancy by the curtesy of England, commonly called "tenancy by the curtesy," is an estate that a husband who survives his wife, takes in her real estates of inheritance. It is an estate in the whole of the lands during the husband's life unless the lands be gavelkind, in which case he takes but a moiety, and his estate determines on his marrying again (*c*).

Valid and subsisting marriage at wife's death.

The marriage must be valid and subsisting at the time of the wife's death; so that, if it be *ipso facto* void, or be avoided by divorce *a vinculo matrimonii*, the right to an estate by the curtesy is defeated (*d*).

Actual birth of issue inheritable in mother's life.

Except in gavelkind.

Tenancy by the curtesy generally attaches only to estates of inheritance which issue of the wife who are actually born might have inherited; but as to gavelkind lands the tenancy by the curtesy arises whether issue are actually born or not (*e*). A notion has prevailed that the child must be heard to cry, but that is a mistake; crying, though a very unmistakable sign,

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(*y*) 45 & 46 Vict. c. 38; see s. 58.

(*z*) 53 & 54 Vict. c. 29.

(*a*) See *Re Charriere*, [1896] 1 Ch. 912.

(*b*) As to Curtesy, see Challis, R. P. 314; Digby, R. P. 173; P. & M. Hist. ii., p. 412, *et seq.*; Shelford R. P. Stat. 349.

(*c*) Co. Litt. 30 a (note by Hargrave).

(*d*) 1 Cruise, Dig. 140.

(*e*) Co. Litt. 30 a, 111 a.

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is not the only evidence of life. The child, however, must be born during the life of the mother. Should she die in labour, and were the child extracted after death from the womb, by what is called the Cæsarean operation, it would not suffice. It may have been born at any time during the coverture, without reference to the actual period of seisin. The issue, as above stated, must have been capable of inheriting the mother's estate. In the case, therefore, of an estate tail limited to her and the heirs male of her body, the birth of a daughter gives the husband no right as tenant by the curtesy (*f*).

It follows from the nature of a joint tenancy (see *post*, p. 252), that there is no curtesy where the wife was a joint tenant.

Wife need not have been legally seised.

Curtesy differs from dower at the Common law, in that it is not necessary that the seisin of the wife, or rather of the husband in her right, should be legal. An equitable seisin (for instance, if the lands were vested in trustees for her and her heirs) would suffice (*g*). As in the case of dower, to give the husband his tenancy by the curtesy, the estate must have been not reversionary but in possession: and, where the hereditaments are corporeal, an actual seisin, as distinguished from seisin in law only, is required (*h*).

Estate must have been in possession.

In wife's separate estate.

After some conflicting decisions, it is now settled that, where lands belong to a wife for her separate use, the husband will take an estate by the curtesy in them, if she dies without having disposed of them by will or otherwise, equity in this case following the law (*i*). The Married Women's Property Act, 1882 (*j*), does not affect the husband's right to curtesy, except so far as the land is conveyed away or devised by the wife (*k*).

Power to lease.

A tenant by the curtesy has the same power of leasing as a tenant in dower under the Settled Estates Act, 1877 (*l*).

Powers under Settled Land Act, 1882.

By the Settled Land Act, 1882 (*m*), the powers of a tenant for life under the Act are given to a tenant by the curtesy; and for purposes of that Act his estate is to be deemed to arise under a settlement made by his wife (*n*), though in fact the property may have come to her by inheritance.

(*f*) 2 Bl. 128; Co. Litt. 29 b; *Paine's Case*, 8 Rep. at 34 b.

(*g*) See *per* M.R. in *Cooper* v. *Macdonald*, 7 Ch. Div. 295.

(*h*) Co. Litt. 29 a. *Ante*, p. 136.

(*i*) *Cooper* v. *Macdonald*, 7 Ch. Div. 288.

(*j*) 45 & 46 Vict. c. 75.

(*k*) *Hope* v. *Hope*, [1892] 2 Ch. 336.

(*l*) 40 & 41 Vict. c. 18, s. 46.

(*m*) 45 & 46 Vict. c. 38, s. 58 (1), (viii.). See *ante*, p. 51, *et seq.*

(*n*) 47 & 48 Vict. c. 18, s. 8.

A tenancy by the curtesy is not frequently met with now, as the rights of husbands in the estates of their wives are generally defined by a marriage settlement. A conveyance, in cases not falling under the provisions of the Married Women's Property Act, 1882 (*o*), by the husband and wife of the wife's real estate, made before 1834 by fine or recovery, or after 1833 by deed, acknowledged pursuant to the Fines and Recoveries Act, 1833 (*p*), and, in cases falling within the Married Women's Property Act, 1882, a conveyance *inter vivos* by the wife alone, or a disposition by her will, will prevent the right of the husband from attaching.

No interference with power of alienation.

As in the case of dower, so in that of curtesy, the origin of its introduction into English law is obscure (*q*).

Origin.

Subject to any rights in respect of dower or curtesy or of the widow under the Intestates' Estates Act, 1890 (*r*), an estate in fee simple devolves on the decease of its owner intestate on the heir; and here, to adopt the words of Blackstone (*s*):—

Inheritance.

"It must first be observed, that by law no inheritance can vest, nor can any person be the actual complete heir of another, till the ancestor is previously dead, *Nemo est haeres viventis*. Before that time the person who is next in the line of succession is called an heir apparent, or heir presumptive. Heirs apparent are such, whose right of inheritance is indefeasible, provided they outlive the ancestor; as the eldest son or his issue, who must by the course of the common law be heirs to the father whenever he happens to die. Heirs presumptive are such, who, if the ancestor should die immediately, would in the present circumstances of things be his heirs; but whose right of inheritance may be defeated by the contingency of some nearer heir being born: as a brother, or nephew, whose presumptive succession may be destroyed by the birth of a child; or a daughter, whose present hopes may be hereafter cut off by the birth of a son. Nay, even if the estate hath descended, by the death of the owner, to such brother, or nephew, or daughter; in the former cases the estate shall be devested and taken away by the birth of a posthumous child; and, in the latter, it shall also be totally devested by the birth of a posthumous son" (*t*).

Heir—what.

The rules of descent had been the same for about 400 years, when Lord Hale reduced them to a series of canons, which

Rules or canons of descent.

(*o*) See *ante*, p. 126.

(*p*) 3 & 4 Will. IV. c. 74, ss. 77, 79, 80; 19 & 20 Vict. c. 108, s. 73; and 45 & 46 Vict. c. 39, s. 7. *Ante*, p. 124.

(*q*) See 2 Bl. 126 and 1 Cruise, Dig. 139. Spelman (Gloss. *s.v. Jus Curialitatis*) and Blount (Law Dict. *s.v. Curtesy of England*) say that curtesy existed in the law of Normandy before the Conquest. As to the origin of the term, see Digby, R. P. 173; P. & M. Hist. ii., p. 412.

(*r*) See *ante*, p. 141.

(*s*) 2 Bl. 208.

(*t*) Where a posthumous child takes by descent, he is entitled to the rents and profits from his birth only; Y. B. 9 H. 6, 25 a; *Goodtitle* d. *Newman* v. *Newman*, 3 Wils. 516.

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were afterwards explained and illustrated by Blackstone in his Commentaries. The same rules, modified by the Inheritance Act, 1833 (*u*) as to persons dying on or after the 1st January, 1834, still prescribe the course of descent. It should be added that, even where the Common law is excluded by the peculiarities of the customs of either gavelkind or borough-English, the course of succession, except so far as such peculiarities affect it, follows the Common law; for example, the descent goes to males before females, to lineal before collateral heirs.

The law of descent as now prevailing, may be reduced to the following canons or rules :—

I. Descent traced from purchaser.

I. In every case descent is traced from the "purchaser" (*x*), *i.e.*, "the person who last acquired the land otherwise than by descent, or than by any escheat, partition, or inclosure, by the effect of which the land has become part of, or descendible in the same manner as, other land acquired by descent" (*y*).

According to the old law, *i.e.*, on death before 1834, descent was to be traced from the person who last had the seisin in deed, *i.e.*, actual seisin as distinguished from seisin in law. This law was briefly expressed in the maxim *Seisina facit stipitem* (*z*). But, in all cases of immediate descent from the first purchaser, the descent was traced from him whether he had an estate in possession, reversion, or remainder, and whether he had actual seisin or not (*a*).

It being often uncertain whether a person had acquired by descent or otherwise, it is provided (*b*) "to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title shall require," that "the person last entitled to the land," who is defined (*c*) as including "the last person who had a right thereto, whether he did or did not obtain the possession of the receipt of the rents and profits thereof," shall be considered to have been the purchaser, unless it be proved that he inherited the same; and "in like manner the last person from whom the land shall be proved to have been inherited shall in every case be considered to have

(*u*) 3 & 4 Will. IV. c. 106. Amended by 22 & 23 Vict. c. 35, ss. 19 and 20. Challis, R. P. 210. See notes on this statute in Shelford, R. P. Stat. 352, *et seq.*

(*x*) 3 & 4 Will. IV. c. 106, s. 2.

(*y*) *Ib.* s. 1, thus defines "Purchaser."

(*z*) 2 Bl. 209; Co. Litt. 11 b.

(*a*) See 2 Preston on Abstracts, 440: *Doe* d. *Parker* v. *Thomas*, 3 Man. & Gr. 815; *Doe* d. *Winder* v. *Lawes*, 7 A. & E. 195.

(*b*) 3 & 4 Will. IV. c. 106, s. 2.

(*c*) *Ib.* s. 1.

been the purchaser, unless it shall be proved that he inherited the same" (*d*).

Devise to heir.

By the Common law, where a man devised land to his heir so that he would take the same estate as would have come to him by descent, he took by the descent, not by the devise; but by the Inheritance Act, 1833, it is enacted that the heir shall be considered to have acquired the land as devisee (*e*), *i.e.*, as a purchaser.

Limitation to heirs of settlor.

Similarly, where by any assurance (other than a will) land was limited to the person or to the heirs of the person who thereby conveyed the same land, such person acquired no new estate, but was entitled as of his former estate (*f*). By the Inheritance Act, 1833, it is provided that in the case of any such assurance executed after 31st December, 1833, the person to whom or to whose heirs the land is limited shall be considered to have acquired the same as purchaser (*g*). A common instance of this is a settlement in which there is an ultimate limitation to the heirs of the settlor (*h*). In such a case the settlor (*e.g.*) although he may originally have acquired the lands by descent, will be accounted the purchaser, not he from whom the lands descended, nor the settlor's heir. By the same Act where any person acquires any land by purchase under a limitation to the heirs of his ancestor, whether by assurance executed after 31st December, 1833, or by the will of a testator dying after that day, such land shall descend as if the ancestor had been the purchaser (*i*).

Failure of heirs of the purchaser.

By the Law of Property Amendment Act, 1859 (*k*), it is provided that where there shall be a total failure of heirs of the purchaser, or where any land shall be descendible as if an ancestor had been the purchaser, and there shall be a total failure of the heirs of such ancestor, the land shall descend as if the person last entitled had been the purchaser.

The expression "land" in the Inheritance Act, 1833, is thereby defined as including every interest capable of being inherited, whether in possession, reversion, remainder, or contingency (*l*).

(*d*) *Ib.* s. 2: see *In re Douglas*, 28 Ch. Div. 327.

(*e*) 3 & 4 Will. IV. c. 106, s. 3.

(*f*) 2 Bl. 242.

(*g*) 3 & 4 Will. IV. c. 106, s. 3.

(*h*) See (*e.g.*) Dav. Conc. Prec., No. cxix., p. 489.

(*i*) 3 & 4 Will. IV. c. 106, s. 4.

(*k*) 22 & 23 Vict. c. 35, s. 19, commonly known as "Lord St. Leonards' Act."

(*l*) 3 & 4 Will. IV. c. 106, s. 1. The section specifies all hereditaments corporeal or incorporeal, freehold or copyhold, or of

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Let us suppose John Smith to die intestate, seised of lands in fee simple; subject to the payment of his debts, if there is not sufficient of his personal estate to pay them, and subject to his widow's right to dower, and possibly to her rights under the Intestates Estates Act, 1890, they will descend. If he was the purchaser, that is, if he acquired them otherwise than by descent (for instance, if they were conveyed or devised to him, and in the latter case, even though he were the heir of the testator (*m*)), they will go to his own heir. Or, suppose he originally acquired the lands by descent, but by a marriage settlement (executed since the 31st December, 1833), he limited the lands to himself for life, and after his death to the first and other sons of the marriage in tail male, and in default of such issue to himself in fee, or "to his own right heirs;" in such case, in the event of his death intestate, after failure of issue in tail male, the descent will now be traced from him as purchaser (*n*).

On the other hand, suppose John Smith to have acquired the lands as heir to his father, Thomas Smith, under a limitation (contained in a deed executed, or the will of a testator dying after 1833) to his father, Thomas Smith, in fee simple; on the death of John Smith intestate, the descent will be traced, not from John Smith, but from Thomas Smith (*o*); unless there is a total failure of heirs of Thomas Smith, in which case only, the descent will be traced from John (*p*). Similarly, if John inherited the lands from his grandfather, who acquired them by purchase, and there is a total failure of heirs of the grandfather, the descent will be traced from John Smith (*q*).

II. To issue.

II. The second rule is that the land shall, in the first place, descend lineally to the issue of the purchaser *in infinitum*.

III. Males before females. Eldest male—females equally.

III. The third rule is that the male issue shall be admitted before the female; and where two or more of the male issue are in equal degree of consanguinity to the purchaser, the eldest only shall inherit, but the females in equal degree shall inherit altogether. In such case the females are called co-parceners,

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any other tenure, and whether descendible according to the Common law or according to the custom of gavelkind or borough-English, or any other custom, and money to be laid out in the purchase of land, and chattels and other property transmissible to heirs, and any possibility, right or title of entry, or action.

(*m*) 3 & 4 Will. IV. c. 106, s. 3.
(*n*) *Ib.*
(*o*) *Ib.* s. 4.
(*p*) 22 & 23 Vict. c. 35, s. 19.
(*q*) *Ib.*

and should they effect a partition of the lands descended to them, they will not thereby become purchasers; but the several parcels of land will descend in the same manner as the individual shares before partition (*r*).

IV. Representation by lineal descendants.

IV. The fourth rule is that the lineal descendants *in infinitum* of any person deceased "represent," or take the place of, their ancestor, that is, they stand in the place in the line of descent in which the deceased person would have stood if he had been living (*s*).

Per stirpes.

This is called taking *per stirpes*, by the roots or stocks, as distinguished from *per capita*, by the heads or individuals. To take an example: if A. leaves a grandchild (the child of A.'s eldest son, who is dead) and other children, the grandchild, whether son or daughter, takes: or, again, suppose that A. has three daughters, C., D., and E., and no sons: C. dies, leaving two sons; D. dies, leaving two daughters; E. dies, leaving a daughter, and son younger than the daughter. When A. dies, C.'s eldest son will be entitled to one-third, D.'s two daughters to another one-third as co-parceners, and E.'s son to the remaining one-third of A.'s lands (*t*).

The preceding rules apply as well to the descent of an estate tail as of an estate in fee simple. But, when the issue are exhausted, the estate tail must determine. Not so in the case of an estate in fee simple, to which the following rules also apply.

V. On failure of descendants, to nearest lineal ancestor.

V. The fifth rule is that, on failure of the issue, *i.e.*, lineal descendants, of the purchaser, the inheritance shall go to his lineal ancestors.

Formerly, on failure of lineal descendants of the person last seised, the inheritance descended to his collateral relations, being of the blood of the first purchaser—subject to the three last preceding rules; for it was held that an inheritance could not ascend, and that therefore no ancestor could inherit. Now, by the Inheritance Act, 1833 (*u*), it is enacted that—

S. 6. "Every lineal ancestor shall be capable of being heir to any of his issue; and in every case where there shall be no issue of the

(*r*) See 3 & 4 Will. IV. c. 106, s. 1, by which "Land" is to include any share of the hereditaments and properties therein mentioned; and *Doe* d. *Crosthwaite* v. *Dixon*, 5 A. & E. 834. As to co-parcenary, see *post*, Ch. IX., p. 262.

(*s*) Wms. R. P. 215; Challis, R. P. 216.

(*t*) See *Cooper* v. *France*, 14 Jur. 214; 19 L. J. (N. S.) 313.

(*u*) 3 & 4 Will. IV. c. 106, s. 6.

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purchaser, his nearest lineal ancestor shall be his heir in preference to any person who would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor, so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue other than a nearer lineal ancestor or his issue."

Thus, suppose John Smith, having acquired his land by purchase, to have died intestate, without issue, leaving a father and brothers and sisters surviving, the father will inherit in preference to the brothers and sisters. Or, again, suppose John Smith, having acquired his land by purchase, to have died intestate without issue, himself having been the only child of his father, who had predeceased him, but leaving a grandfather and first cousins him surviving, the grandfather will inherit in preference to the cousins.

VI. Preference to paternal line.

VI. The sixth rule is that, among the lineal ancestors of the purchaser, the paternal line (whether of the purchaser, or of any ancestor, male or female), is always preferred to the maternal.

In collateral inheritances the male stocks are preferred to the female. So it is provided (*x*) in continuation of the last rule.

S. 7. "That none of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants, shall be capable of inheriting until all his paternal ancestors and their descendants shall have failed; and, also, that no female paternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male paternal ancestors and their descendants shall have failed; and that no female maternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male maternal ancestors and their descendants shall have failed."

In like manner, where there is a failure of male paternal ancestors and their descendants, the mother of his more remote male paternal ancestor or her descendants shall be preferred to the mother of a less remote or her descendants; and where there is a failure of male maternal ancestors and their descendants, the mother of his more remote male maternal ancestor and her descendants shall be preferred to the mother of a less remote male maternal ancestor and her descendants (*y*). After the female paternal ancestors and their heirs, then, comes the mother of the purchaser.

(*x*) 3 & 4 Will. IV. c. 106. (*y*) *Ib.* s. 8.

A learned controversy had arisen whether, where, upon failure of the male paternal line, it became necessary for the first time to resort to a female stock, the descent should be traced through the mother of the nearer or more remote ancestor in that line (*z*). This doubt was settled by the above provisions of the Inheritance Act, 1833 (*a*).

According to the sixth rule, then, had John Smith died without issue, but (1) leaving his grandfather on his father's side, and his grandfather's mother and his own mother, him surviving; his mother could in no case inherit so long as there lived his grandfather, or any of his grandfather's descendants, or his grandfather's mother or any of her descendants. Or (2), suppose him to have left his grandmother on his father's side, and his great-grandfather on his father's side; his grandmother and her descendants could not inherit until after the failure of his great-grandfather and his descendants. Or (3), suppose that he left no paternal ancestors or mother, but his mother's mother and mother's father's father him surviving; his mother's mother or her descendants could in no case inherit so long as there lived his mother's grandfather or any of his descendants (*b*). Again, suppose John Smith to have left the mother of his father, and the mother of his father's father him surviving; the mother of his father's father and her descendants would inherit before the mother of his father and her descendants. In like manner, suppose John Smith to have died, all his relations on his father's side having predeceased him, likewise his mother, but his mother's mother and his mother's father's mother to have survived him, the mother's father's mother and her descendants would be preferred to his mother's mother and her descendants.

VII. Half blood.

VII. The seventh rule is, that the issue of an ancestor related by the whole blood to the purchaser, are preferred to those related by the half blood. By the old law the half blood could not inherit, but now it is provided by the Inheritance Act, 1833 (*c*):—

> "That any person related to the person from whom the descent is to be traced by the half blood shall be capable of being his heir; but a relation by the half blood is to stand in the order of inheritance next after any relation in the same degree of the whole blood

(*z*) 2 Bl. 237.
(*a*) 3 & 4 Will. IV. c. 106, s. 8.
(*b*) 3 & 4 Will. IV. c. 106, s. 7.
(*c*) *Ib.* s. 9.

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and his issue, where the common ancestor is a male, and next after the common ancestor where such ancestor is a female: so that the brother of the half blood on the part of the father shall inherit next after the sisters of the whole blood on the part of the father and their issue, and the brother of the half blood on the part of the mother next after the mother."

Thus, suppose A. to have had one son B. by his wife X., and two sons C. and D., and two daughters E. and F. by another wife Y.: C., having purchased land dies without issue, his father A. being also dead. D., his younger brother, takes, or, on failure of him and his issue, the sisters E. and F. succeed in preference to B., the eldest brother; but on failure of them and their issue of the half blood, B. (though only of the half blood) and his issue will succeed in preference to any collateral relation not descended from their father A., though of the whole blood with C. Again, suppose A. B. to be the purchaser and to die without issue, but leaving two brothers and two sisters, and a half-brother by his mother Z., who has married again since his father's death: so long as any of the paternal line of A. B. remain, *i.e.*, the father, the father's ancestors, male and female, and their descendants, his half-brother cannot inherit, for his mother could not; but, failing the paternal line, next to his mother in the order of succession will come the half-brother, and in preference to any other collateral relation of A. B. *ex parte maternâ*, though of the whole blood of A. B.

Death duties.

On the death of an owner of real estate, whether his estate is for life or of inheritance, it may become liable to succession duty (*d*), to additional succession duty (*e*), and to estate duty (*f*).

(*d*) The Succession Duty Act, 1853 (16 & 17 Vict. c. 51).

(*e*) The Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8, s. 21).

(*f*) The Finance Act, 1894, Part I. (57 & 58 Vict. c. 30); amended by the Finance Act, 1896 (59 & 60 Vict. c. 28), Part IV.

CHAPTER VI.

ESTATES LESS THAN FREEHOLD—ESTATES AT WILL—ESTATES FOR YEARS—ESTATES BY SUFFERANCE.

Estates in Real Property may be divided into (1) freehold estates, and (2) estates less than freehold. Having discussed the nature and incidents of the former, we now proceed to the consideration of the latter.

Classification and general characteristics.

Of estates less than freehold, the most important are:—I. Estates at will; II. Estates for years (including tenancies from year to year); and, III. Estates by sufferance.

The use of the expression "goods and chattels," as descriptive of personal property generally, has been already referred to (*a*): and the estates under discussion, notwithstanding the immovability of the subject-matter, are ranged under the classification of personalty; but, by reason of their connection with land, they are said to "savour of the realty." They are therefore often spoken of as chattel interests in land; and leaseholds or terms of years are called "chattels real" (*b*).

At Common law a freehold interest in land can be created only by livery of seisin (*c*): but a chattel interest in real estate could be created or transferred by parol (*d*). The Statute of Frauds (*e*) provided that leases for years created by parol "and not put in writing and signed by the parties making or creating the same or their agents thereunto lawfully authorized by writing shall have the force and effect of leases or estates at will only," except (*f*)

(*a*) *Ante*, p. 14.

(*b*) Other instances of chattel interests in land are tenancies by statute merchant, statute staple, and *elegit* (Co. Litt. 42 a, *ib.* 118 b), of which the two first named are obsolete (as to tenancy by *elegit*, see *post*, Ch. XIV.).

(*c*) *I.e.*, by act *in pais*. It could also be transferred by fine or recovery, which were fictitious actions; *ante*, p. 67, *et seq.*

(*d*) "By parol" is sometimes used to describe a transaction effected otherwise than by deed, whether it be oral or by an instrument in writing, but not sealed and delivered. See *e.g.*, *Rann* v. *Hughes*, 7 T. R. 350; where it is said that all contracts are according to the law of England either agreements by specialty (*i.e.*, deed) or agreements by parol.

(*e*) 29 Car. II. c. 3, s. 1.

(*f*) *Ib.* s. 2.

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leases not exceeding the term of three years from the making thereof, whereupon the rent reserved during the term amounts to two third parts of the full annual value. It was by the same Act further provided (*g*) that no leases should be assigned or surrendered unless by deed or note, in writing, signed by the party assigning or surrendering the same "or their agents thereunto lawfully authorized by writing" (*h*).

By the Real Property Act, 1845 (*i*), "any lease required by law to be in writing of any tenements or hereditaments, and an assignment of a chattel interest, not being copyhold, in any tenements or hereditaments" are to be void at law unless made by deed.

But though an instrument be void as a lease, as not being by deed, it may be good as an agreement, and where possession has been given, the tenant will hold under the same terms as if a lease had been granted (*k*).

The leases which are excepted from the Statute of Frauds, as above mentioned, are not required by law to be in writing, and therefore need not be made by deed; but all assignments of leases, even of those so excepted, must be by deed.

Devolution.

All chattels real in their incidents partake of the nature of personalty. On the death of the owner, they devolve not upon the heir, the ordinary representative as regards land, but upon the executor or administrator, both of whom are comprehended in the phrase "personal representative." Indeed, they will do this even if they are expressly limited to the heirs; inasmuch as heirs cannot succeed to an interest of the character of personalty (*l*). And if an attempt be made to create an estate tail in chattels real, the property vests absolutely in the first taker (*m*). Thus, suppose a grant of a term of years, or other chattel interest, to A. "and his heirs"; the property would on the death of A. devolve on his executors (*n*). So, under a limitation for a term of years to A. "and the heirs of his body," A. would take

(*g*) 29 Car. II. c. 3, s. 3.

(*h*) See *Botting* v. *Martin*, 1 Camp. 318.

(*i*) 8 & 9 Vict. c. 106, s. 3. See the observations on this section in Dav. Conc. Prec., pp. 8, *et seq.*

(*k*) *Parker* v. *Taswell*, 2 De G. & J. 559. And since the Judicature Act, an agreement for a lease *of which specific performance would be granted* appears to be equivalent to an actual lease; see *Walsh* v. *Lonsdale*, 21 Ch. Div. 9; *Allhusen* v. *Brooking*, 26 Ch. Div. 559; *Lowther* v. *Heaver*, 41 Ch. Div. 248; *Swain* v. *Ayres*, 21 Q. B. D. 289; *Coatsworth* v. *Johnson*, 55 L. J. Q. B. 220; *i.e.*, in a Court which has jurisdiction to grant specific performance, not in a County Court, *Foster* v. *Reeves*, [1892] 2 Q. B. 255.

(*l*) Elph. N. & C. Interp. 257.

(*m*) *Ante*, p. 79; Elph. N. & C. Interp. 260.

(*n*) 1st Inst., s. 740.

absolutely, and the property would go, not to A.'s issue, but to his personal representative. As we have before observed (*o*), personal property is regarded as essentially the subject of absolute ownership; and, strictly speaking, the legal ownership of it is not capable of being dealt with so as to create a succession of interests analogous to successive estates in real property. It has, however, been pointed out that a similar result may be obtained through the medium of a declaration of trust of the beneficial or equitable ownership for persons in succession; and it may be here noticed that if a term of years be bequeathed to A. for his life, and on his death to B., although the whole term is considered to vest in A. during his life, on his death it will shift to and vest in B. (*p*)

General devise of lands.

From the time of Charles I., it has been held that where in a will there is a general devise of lands and the testator had no freeholds, leaseholds will pass; but it was formerly held that leaseholds would not pass by a general devise if there were any freeholds (*q*). Now, however, by the Wills Act, 1837 (*r*), a general devise of the land of the testator, whether there be freeholds or not, will include leaseholds, unless a contrary intention appear by the will.

Possession.

In reference to a legal freehold interest (*s*), the technical expression by which the possession of the owner is described is "seisin;" but in reference to a chattel real interest, it is "possession." So it is said, as respects the former, that the party is "seised" of the land; as respects the latter, that he is "possessed" of the term (*t*). This originated in the principle of the feudal system, which ascribed seisin only to that which was the subject-matter of a fief (*u*).

(*o*) See *ante*, p. 31.

(*p*) Wms. P. P. 338; 1 Cruise, Dig. 235; and see as to such "Executory Devises of Terms for Years," 6 Cruise, Dig. 392, *et seq.*; and *post*, p. 285.

(*q*) *Rose* v. *Bartlett*, Cro. Car. 293. See Theob. 182.

(*r*) 7 Will. IV. & 1 Vict. c. 26, s. 26. See on this section, *Butler* v. *Butler*, 28 Ch. Div. 66; and see *post*, Ch. XV.

(*s*) *Leach* v. *Jay*, 9 Ch. Div. 42.

(*t*) See Co. Litt. 200 b, 201 a.

(*u*) The statement in the text as to the reason of the application of the word "seisin" to legal freehold interests appears to have been originally made by Lord Mansfield in *Taylor* d. *Atkyns* v. *Horde* (1 Burr. 107; and in 2 Sm. L. C.); but, as shown by Professor Maitland in a most interesting article on "Seisin of Chattels," L. Q. R., vol. i., p. 324, it is probably incorrect. Up to the middle of the fifteenth century "seisin" was applied to chattels equally with freeholds, and the word "possessed" was but rarely used. Gradually the two words acquired their modern meanings. See also another article by Professor Maitland, "The Mystery of Seisin," 2 L. Q. R. 481; P. & M. Hist., ii., 29, *et seq.*; and the remarks of Fry, L.J., in *Cochrane* v. *Moore*, 25 Q. B. D. 57, at pp. 65, 66.

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Term of years may commence *in futuro*.

It is a doctrine of the Common law that an estate of freehold cannot be limited to commence at a future time (*x*), except by way of remainder limited to take effect upon the determination of a previous estate of freehold. The principle was, that the seisin should never be in abeyance, since the exigencies of a feudal holding required the presence of a tenant to discharge the feudal obligations (*y*). Such is the doctrine as to conveyances operating at Common law; but the introduction of uses, as will hereafter appear, introduced some modification in regard to conveyances operating by virtue of the Statute of Uses. In the case of chattel interests in land, this objection did not apply, and a term of years might be granted to commence at a future period; for the freehold is not thereby put in abeyance, but still continues in the lessor (*z*), and the seisin is in all cases regarded as quite independent of, and unaffected by the existence of any term of years (*a*).

Estate at will (*b*).

These observations will explain the general nature of a chattel estate. We proceed now to consider in detail each of the three kinds of chattel interests specified above; and first, as to an estate at Will.

Definition.

"Tenant at will," says Littleton (*c*), "is where lands or tenements are let by one man to another to have and to hold to him at the will of the lessor; by force of which lease the lessee is in possession." But the law implies it to be at the will of the lessee also (*d*). The tenancy may be created by express agreement, orally or in writing, or by construction of law. Thus, where the legal estate is vested in a trustee, though the *cestui que trust* may in equity be entitled to possession of the land, he is at

Creation.

(*x*) Challis, R. P. 93, *et seq.*; 1 Cruise, Dig. 53 (Tit. i., ss. 32, 33).

(*y*) "The freehold never could be in abeyance, because the lord must never be at a loss to know upon whom to call as his tenant; nor a stranger at a loss to know against whom to bring his *præcipe*;" *per* Lord Mansfield, C.J., in *Taylor* d. *Atkyns* v. *Horde*, 1 Burr. 108; S. C. 2 Sm. L. C.

(*z*) 1 Cruise, Dig. 226.

(*a*) Challis, R. P. 89; 1 Cruise, Dig. 224, 225 (ss. 10, 11).

(*b*) As to estates at will, see 1 Cruise, Dig., pp. 242, *et seq.*; Tudor, L. C. R. P. (in notes to *Richardson* v. *Langridge*); Wms. R. P. 469; Smith, L. & T., Lect. i. And see the remarks of Mr. Challis (R. P. 53) to the effect, that in the earliest period of the Common law the only estates less than freehold were estates at will, and that the latter class probably consisted entirely of the holdings of tenants who were not personally free. These tenancies subsequently became the more modern copyholds; and the tenancies at will considered in the text have a different origin, viz., in contract, express or implied.

(*c*) S. 68.

(*d*) Co. Litt. 55 a.

Common law, a mere tenant at will to the trustee (*e*); and where a person is in possession of lands under a lease which is void, he is, at Common law, a tenant at will (*f*).

Determination.

As to what will determine a tenancy at will, Blackstone (*g*) says:—

"What act does, or does not, amount to a determination of the will on either side, has formerly been matter of great debate in our Courts. But it is now, I think, settled, that (besides the express determination of the lessor's will, by declaring that the lessee shall hold no longer; which must either be made upon the land, or notice must be given to the lessee) the exertion of any act of ownership by the lessor, as entering upon the premises and cutting timber, taking a distress for rent and impounding them thereon, or making a feoffment, or lease for years of the land to commence immediately; any act of desertion by the lessee, as assigning his estate to another, or committing waste, which is an act inconsistent with such a tenure; or, which is *instar omnium*, the death or outlawry of either lessor or lessee; puts an end to or determines the estate at will."

Effect of assignment.

A tenancy at will is not assignable; but an assignment by the tenant at will is no determination of the tenancy as against the reversioner, unless he have notice of the assignment; in other words, a tenant at will cannot determine his tenancy by transferring his interest to a third party without notice to his landlord (*h*).

A yearly tenancy or from year to year.

An abrupt termination of a tenancy being likely to lead to much practical inconvenience on both sides, in modern times a letting at an annual rent, though payable half-yearly or quarterly, where the letting is not expressly stated to be at will, and where no certain period is limited, has been construed to be a "yearly tenancy"—that is, a tenancy from year to year, so long as it suits both parties that the holding should endure.

Determinable by notice.

Tenancies of this description are determinable only on formal notice to quit; and the notice which the law prescribes (in the absence of agreement) is one of at least half a year (*i*) before the expiration of the current year of the tenancy. Thus, supposing the

(*e*) *Melling* v. *Leak*, 16 C. B. 669; Lewin, p. 761; Wms. R. P. 470.

(*f*) *Denn* v. *Fearnside*, 1 Wils. 176. See further as to the creation of tenancies at will, *post*, p. 158.

(*g*) Vol. ii., 146. See also 1 Cruise, Dig. 244, 245; Smith, L. & T., Lect. i., p. 18; and Tudor, L. C. R. P., p. 18.

(*h*) *Pinhorn* v. *Souster*, 8 Ex. 763.

(*i*) "Half a year," and not "six months," is the proper expression (Patteson, J., *Doe* d. *Williams* v. *Smith*, 5 A. & E. 351). See the cases collected in 39 Sol. J. 310. A half-year means 182 days; *Anon.*, Dy. 345 a; 6 Rep. 62: see *Sidebotham* v. *Holland*, [1895] 1 Q. B. 378, at p. 384, *per* Lindley, L.J. The word "month" means *lunar* month unless the contrary

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tenancy to begin on the 1st January in any year, the notice must be given in or before the previous June, so that the tenancy may expire on 31st December. The notice would be bad if directed to an expiration in June, for it must expire at that period of the year at which the tenancy commenced (*k*). But a "customary half-year's" notice is sufficient where the tenancy has commenced on one of the customary quarter-days (viz., Lady-Day, Midsummer-Day, Michaelmas-Day, and Christmas-Day); so that a notice served on 28th September to quit on the ensuing 25th March, will be sufficient in the case of a Lady-Day tenancy; but not a notice served on the 26th March to quit on the next 29th September, in the case of a Michaelmas tenancy (*l*).

The tenancy cannot be determined by one only of the parties except at the end of any number of whole years from the time it began (*m*); but it may be so determined at the end of the first year, as well as subsequent years, by proper notice, unless in creating such tenancy, the parties use words shewing they contemplate a tenancy for two years at least (*n*).

Notice under Agricultural Holdings Act, 1883.

Under the Agricultural Holdings Act, 1883, instead of the half-year's notice, a year's notice is, in the absence of written agreement to the contrary, required in the case of agricultural holdings (that is, holdings wholly agricultural or wholly pastoral, or in part agricultural, and as to residue pastoral, or in whole or in part cultivated as a market-garden), except holdings let to the tenant during his continuance in any office, appointment, or employment held under the landlord. The Act provides:—

S. 33. "Where a half-year's notice, expiring with a year of

appear to be the meaning from the subject-matter to which that term is applied; Co. Litt. 135 b (*Johnstone* v. *Hudleston*, 4 B. & C. 932; *Rogers* v. *Kingston Dock. Co.*, 34 L. J. Ch. 165; Dart, V. & P. 492). The circumstances of the parties or the contract may show that "month" means a *calendar* month, and this construction is adopted in mercantile contracts; *Hart* v. *Middleton*, 2 C. & K. 9; *Reg.* v. *Chawton*, 1 Q. B., at 250. In ecclesiastical matters "month" means *calendar* month; *Catesby's Case*, 6 Rep. 377. In Acts of Parliament passed since 1850, "month" means *calendar* month; Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 3, replacing a similar provision in 13 & 14 Vict. c. 21, s. 4; but in Acts passed before 1850 "month" means *lunar* month (unless in either case the contrary intention appears).

(*k*) A notice expiring on the anniversary of the day on which the tenancy commenced appears to be good; *Sidebotham* v. *Holland*, [1895] 1 Q. B. 378.

(*l*) *Morgan* v. *Davies*, 3 C. P. D. 260; *Sidebotham* v. *Holland*, [1895] 1 Q. B. 378, at 387. See Foa, L. & T. 479. As to the supposed origin of tenancies from year to year, see the notes to *Clayton* v. *Blakey*, 2 Sm. L. C.

(*m*) *Doe* v. *Porter*, 3 T. R. 13.

(*n*) *Doe* d. *Clarke* v. *Smaridge*, 7 Q. B. 957.

tenancy, is by law necessary and sufficient for determination of a tenancy from year to year, in the case of any such tenancy under a contract of tenancy made either before or after the commencement of this Act, a year's notice so expiring shall, by virtue of this Act, be necessary and sufficient for the same, unless the landlord and tenant of the holding by writing under their hands, agree that this section shall not apply, in which case a half-year's notice shall continue to be sufficient; but nothing in this section shall extend to a case where the tenant is adjudged bankrupt, or has filed a petition for a composition or arrangement with his creditors" (*o*).

Yearly tenancy by parol.

A lease from year to year where the rent reserved amounts to two third parts of the improved value falls within the exception contained in the Statute of Frauds (*p*), and can therefore be made by parol; but if less rent is reserved, the lease must be made by deed (*q*). Where a lease for a term is void under the Statute of Frauds and the Real Property Act, 1845 (*r*), the tenant if he enters and pays rent, holds from year to year upon the terms of the lease in other respects (*s*). Thus, notwithstanding the positive words of the statute, what is in its inception a void lease is in such cases construed as a tenancy from year to year.

Yearly tenancy by payment of rent.

It is said (*t*) that "the words of the statute are satisfied by holding that a parol demise for more than three years creates, *in the first instance*, an estate at will strictly so-called, which estate at will, when once created, may, like any other estate at will, be changed into a tenancy from year to year by payment of rent, or other circumstances indicative of an intention to create such yearly tenancy": and that "one of the incidents of a lease at will is its convertibility, by payment of rent, into a tenancy from year to year." "If a party enters and pays, or promises to pay, a rent certain, or settles it in account, a new agreement may be presumed, under which the landlord may have a right to distrain" (*u*).

Payment of rent must be in reference to a yearly holding.

But the payment of rent must be in reference to a yearly holding; if not paid with reference to a year or an aliquot part of a year, the tenancy will remain at will only (*x*). The reason

(*o*) 46 & 47 Vict. c. 61, ss. 33, 54. The section does not apply where there is an express provision for six months' notice; *Barlow* v. *Teal*, 15 Q. B. D. 403, 501: *Wilkinson* v. *Calvert*, 3 C. P. D. 360.

(*p*) 29 Car. II. c. 3. See *ante*, p. 151.

(*q*) *Wood* v. *Beard*, 2 Ex. D. 30.

(*r*) 8 & 9 Vict. c. 106, s. 3. See *ante*, pp. 151, 152.

(*s*) See notes to *Doe* d. *Rigge* v. *Bell*, in 2 Sm. L. C. And see *per* Kelly, C.B., in *Martin* v. *Smith*, L. R. 9 Ex. 51.

(*t*) Notes to *Clayton* v. *Blakey*, in 2 Sm. L. C.

(*u*) *Per* Tindal, C.J., *Regnart* v. *Porter*, 7 Bing. 453.

(*x*) *Richardson* v. *Langridge*, 4 Taunt. 128; S. C. 2 Sm. L. C.

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is, that payment and receipt with reference to a yearly holding is evidence of the intention of the parties that a yearly tenancy should be created; but it is evidence only, which may be rebutted by evidence of other circumstances, shewing a different intention (*y*).

Tenancy at will may still be created.

A tenancy at will, properly so-called, may still be created by express words; and it will arise where a person holds rent free by permission of the owner—as a minister placed in possession by trustees for the congregation (*z*), or where a person enters under an agreement to purchase, or for a lease, and has not paid rent (*a*).

Form of yearly letting.

In the case of a yearly letting, the demise is expressed in some such form as the following:—

"For the term of one year from the day of , and so on from year to year until the demise shall be determined at the end of the first or any subsequent year, by either party giving to the other calendar months' previous notice in writing" (*b*).

But for the words "until, &c." such lease would enure as a demise for two years certain from the commencement (*c*).

Yearly tenancy not determined by assignment or death.

A tenancy from year to year does not determine by an assignment (*d*), or by the death of either of the parties.

Waste.

Both tenants at will and tenants from year to year are liable for voluntary waste, and perhaps for permissive waste (that is, letting the property fall out of repair (*e*)), and a tenant from year to year is bound to keep the house in weather-tight condition (*f*).

Estate for years.

An estate for years is thus defined by Blackstone:—

Definition.

"An estate for years is a contract for the possession of lands or tenements for some determinate period; and it takes place where a man letteth them to another for the term of a certain number of years, agreed upon between the lessor and the lessee, and the lessee enters thereon" (*g*).

He continues (*h*)—

"These estates were originally granted to mere farmers or husband-

(*y*) See notes to *Clayton* v. *Blakey*, 2 Sm. L. C.

(*z*) Tudor, L. C. R. P., p. 12.

(*a*) Dart, V. & P. 504, 505; *ib.* 1085.

(*b*) See Stud. Prec., No. xii., p. 24.

(*c*) *Denn* v. *Cartwright*, 4 East, 32; Foa, L. & T. 90.

(*d*) *Allcock* v. *Moorhouse*, 9 Q. B. D. 371.

(*e*) *Post*, p. 164.

(*f*) Smith, L. & T. 295, 296.

(*g*) Vol. ii., 140; Co. Litt. 43 b.

(*h*) 2 Bl. 141. But see 2 P. & M. Hist. 105, *et seq.*, as to the early history of Terms of Years.

men, who every year rendered some equivalent in money, provisions, or other rent, to the lessors or landlords; but, in order to encourage them to manure (*i*) and cultivate the ground, they had a permanent interest granted them, not determinable at the will of the lord. And yet their possession was esteemed of so little consequence, that they were rather considered as the bailiffs or servants of the lord, who were to receive and account for the profits at a settled price, than as having any property of their own. And therefore they were not allowed to have a freehold estate: but their interest (such as it was) vested after their deaths in their executors, who were to make up the accounts of their testator with the lord, and his other creditors, and were entitled to the stock upon the farm. The lessee's estate might also, by the ancient law, be at any time defeated, by a common recovery suffered by the tenant of the freehold" (*k*).

Entry.

It will be observed, that in Blackstone's definition of an estate for years, it is treated as a condition of the creation of the estate, that the lessee should enter on the lands under the contract. This is due to the fact that such interests in land were, in the earlier history of the law, regarded as being in the nature of a personal contract only between the lessor and the lessee (*l*). And, even after it was held that they were actual estates in the land, it was not until the contract was followed up by the taking possession under it, that the estate in the lands was considered to arise (*m*). But although before entry no action could be maintained by the lessee for a trespass to the lands (*n*), yet the law recognized that he had an assignable interest—called an *interesse termini* (an "interest in the term"), which was capable of being transferred or granted over to another (*o*). But if the lease were made by a conveyance operating by virtue of the Statute of Uses (of which hereafter), the lessee would have the whole term vested in him as if he had actually entered (*p*).

Interesse termini.

In the words of Bayley, J. (*q*):—

"The right upon a lease to commence *in præsenti* is (except under the Statute of Uses) until entry an *interesse termini* only: and so is the

(*i*) "Manure" in this connexion appears to be synonymous with "cultivate;" see Elph. N. & C. Interp. 571, note (*b*), and Co. Litt. 145 b, who speaks of "*goods* taken" (*i.e.*, hired) "to manure his lands," meaning instruments of husbandry.

(*k*) *Flower* v. *Rigdon*, Cro. El. 284; *Pledgard* v. *Lake*, Cro. El. 718; Co. Litt. 46 a; 2nd Inst. 321; Stat. Gloucester, 6 Edwd. I. c. 11; 21 Hen. VIII. c. 15.

(*l*) *Supra*, p. 16.

(*m*) 1 Cruise, Dig. 224 (s. 10); Smith, L. & T., p. 14.

(*n*) *Wallis* v. *Hands*, [1893] 2 Ch. 75.

(*o*) Co. Litt. 46 b; *ib.* 270 b. The phrase *interesse termini* has no application to a freehold, *e.g.*, a lease for life or lives; *per* Chitty, J., *Ecclesiastical Commissioners* v. *Treemer*, [1893] 1 Ch. 166, at 171.

(*p*) 1 Cruise, Dig. 225 (s. 14).

(*q*) *Doe* d. *Rawlings* v. *Walker*, 5 B. & C. 111, at p. 118.

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right upon a lease to commence *in futuro*; and the same rules are applicable to both. Each is a *right* only, not an *estate*. The whole *estate*, notwithstanding such right, is in the lessor" (*r*).

Limitation.

It is usual to limit an estate for years to a man and his "executors and administrators"; but it is sufficient if it be granted to himself only, without mention of his personal representatives; for in them, on his death, the law will vest it without any special words of limitation (*s*).

Estoppel.

The principle of "estoppel" is that what a man has affirmed or represented to be the truth shall not be contradicted by him or by those claiming through him, to the injury of those who have acted on the faith of the representation (*t*).

Accordingly, in cases at least where a lease is made by indenture, during the term the lessor cannot as against the tenant deny that he had power to grant the lease (*u*) and the lessee cannot deny the right of the lessor to grant it (*x*).

Term.

Certain beginning.

Certain ending.

The definition of an estate for years requires the interest to be for some fixed period. Such an interest is ordinarily styled a "term," from the Latin word *terminus*, which, as Coke says, "doth not only signify the limits and limitation of time, but also the estate and interest that passeth for that time;" and he adds that "regularly in every lease for years the term must have a certain beginning and a certain end" (*y*). The period may be fixed by reference to a date antecedent to the date of the making of the lease, or it may commence from a future time, as a lease

(*r*) The person entitled to an *interesse termini* has an action against the lessor who declines to put him in possession; *Coe* v. *Clay*, 5 Bing. 440; *Jinks* v. *Edwards*, 11 Ex. 775; *Wallis* v. *Hands*, [1893] 2 Ch. 75. As to the distinction between a lease of the reversion and a reversionary lease, see Elph. Introd. 240; *Doe* d. *Rawlings* v. *Walker*, 5 B. & C. 111; *Doe* d. *Agar* v. *Brown*, 2 El. & Bl. 331.

(*s*) Wms. Exors. 1595; Wms. P. P. 345.

(*t*) Not as Lord Coke says (Co. Litt. 352 a), "it is called an estoppel because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth," for which reason it has been said to be "odious," and that it ought to be construed strictly; see *Cuthbertson* v. *Irving*, 4 H. & N. 742, and notes to *Spencer's Case*, in 1 Smith's L. C. See also as to estoppel, *per* Jessel, M.R., in *Re Stringer*, 6 Ch. Div. 1; Elph. Introd. 57; and, as to estoppel by recital, Elph. N. & C. Interp. 140, *et seq.* The estoppel does not extend to persons who do not claim under the tenant. Therefore a lessor who has no title cannot distrain for rent on the goods of a stranger; *Tadman* v. *Henman*, [1893] 2 Q. B. 168. See further as to estoppel, Fox, L. & T., pp. 358, *et seq.*; *Dalton* v. *Fitzgerald*, [1897] 1 Ch. 440; affirmed, [1897] W. N. (61) 1.

(*u*) This rule is subject to some exceptions, see Co. Litt. 47 b.

(*x*) *James* v. *Landon*, Cro. El. 36; *Delaney* v. *Fox*, 2 C. B. (N. S.) 768 (where the tenancy was not created by deed); and see *Clark* v. *Adie*, No. 2, 2 App. Cas. 423, p. 435, *per* Lord Blackburn.

(*y*) Co. Litt. 45 b.

for a hundred years from next Easter (*z*); but it must be for a term of years. As we have seen, a tenancy for life, or for the life or lives of another or others, is an estate of freehold (*a*); but a lease to A. for ninety-nine years (or any other term of years, however long), "should he so long live," gives him only a chattel real.

Surrender (*b*).

A term of years may be destroyed by either "surrender" or "merger."

"Surrender" is the yielding up of the term itself (*c*) to the immediate reversioner, that is the person out of whose interest it is carved, or who has a right to the possession immediately expectant on its cesser or determination (*d*). This surrender may be either by the act of the party or by implication of law—the one being styled a surrender "in fact," the other a surrender "in law." A surrender in fact takes place on any voluntary yielding up of the term; a surrender in law may be effected by the creation of a new interest inconsistent with the continuance of the old estate, as when the tenant himself accepts a fresh valid (*e*) lease to commence before the expiration of the original one (*f*). The mere consent of the tenant to the grant to a stranger of a new lease to commence before the expiration of the existing lease does not operate as a surrender of the existing lease unless it be accompanied with an actual giving up of the possession (*g*).

By the Real Property Act, 1845 (*h*), it is provided that a surrender in writing of an interest in any tenements or heredita-

(*z*) A reversionary lease is a mere *interesse termini* during the existence of the prior interests; see *e.g.*, *Doe* d. *Rawlings* v. *Walker*, 5 B. & C. 111, and note (*r*), p. 160, *ante*.

(*a*) Leases for a life or lives at a rent are sometimes met with, and were formerly very common. The interest of the tenant under them is a freehold and not a term.

(*b*) As to surrender, see Challis, R. P. 77. It is not certain whether a surrender may be made to take effect *in futuro*, see *Parker* v. *Briggs*, 37 Sol. J. 452; *Weddall* v. *Capes*, 1 M. & W. 50; *Doe* d. *Murrell* v. *Milward*, 3 M. & W. 328.

(*c*) There can be no surrender strictly speaking of an *interesse termini*, for it is not an *estate*; see *Doe* d. *Rawlings* v. *Walker*, 5 B. & C. 111; 1 Cruise, Dig. 237; Smith, L. & T. 15, note.

(*d*) Co. Litt. 337 b; see, as to reversion, *post*, Ch. VIII.

(*e*) *Doe* d. *Egremont* v. *Courtenay*, 11 Q. B. 702.

(*f*) Co. Litt. 338 a; 37 Sol. J. 539; *Davison* v. *Stanley*, 4 Burr. 2210; *Lyon* v. *Reed*, 13 M. & W. 285; Smith, L. & T. 355; but a mere agreement for a new lease will not operate as a surrender; *ib.* 356.

(*g*) *Wallis* v. *Hands*, [1893] 2 Ch. 75. See *Nickells* v. *Atherstone*, 10 Q. B. 944; *M'Donnell* v. *Pope*, 9 Hare, 706; and *Phené* v. *Popplewell*, 12 C. B. (N. S.) 334, 341 (cited in Smith, L. & T. 364).

(*h*) 8 & 9 Vict. c. 106, s. 3; see also s. 9, *post*, p. 171.

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ments, not being a copyhold interest, and not being an interest which might by law have been created without writing, shall be void at law unless made by deed.

Leases belonging to infants (*i*) and to married women may, under the direction of the Chancery Division of the High Court, be surrendered and new ones granted (*k*); and leases belonging to lunatics may, under the direction of the Judge in Lunacy, be surrendered by their committees and new ones taken for their benefit (*l*).

Merger (*m*).

"Merger" takes place when there is an acquisition by the lessee of another estate inconsistent with the existence of the term, provided that there is no intervening estate (*n*). Says Blackstone (*o*) :—

> "Whenever a greater estate and a less coincide and meet in one and the same person, without any intermediate estate, the less is immediately annihilated; or, in the law phrase, is said to be 'merged,' that is, sunk or drowned, in the greater."

Thus, where the "termor" (that is, the person in whom the term is vested) acquires an estate of freehold in the land, even an estate for life (which, as we have seen, is larger than any term of years however long), if that estate be the reversionary interest immediately expectant on the determination of the term, a merger takes place. So even if the reversion be only another term of years, and the lessee becomes possessed of that reversionary term, the first term merges in the reversionary term. Thus, if a term be granted to A., and another term, to commence after the expiration of A.'s term, be granted to B., then, if A. acquires B.'s term, the first term would merge in the second. This would take place even were the second term of a shorter duration than the first. Thus, if A.'s term be for 1,000 years, and B.'s term for 500 years only, the 1,000 years term would nevertheless merge in the 500 years term (*p*).

(*i*) See *In re Griffiths*, 29 Ch. Div. 248.

(*k*) The Infants' Property Act, 1830 (11 Geo. IV. & 1 Will. IV. c. 65), s. 12, and Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 34. As to the power of tenants for life under the Settled Land Act to accept surrenders, see *ante*, p. 56.

(*l*) 53 Vict. c. 5, s. 120.

(*m*) Challis, R. P. 76; Fos, L. & T. 509, *et seq.*

(*n*) *Doe* d. *Rawlings* v. *Walker*, 5 B. & C. 111, at p. 120.

(*o*) Vol. ii. 177; and see, on the doctrine of merger, the remarks of Bayley, J., in *Doe* d. *Rawlings* v. *Walker*, 5 B. & C. 111, at p 120.

(*p*) See 6 Cruise, Dig. 475 (s. 37), who observes that "an estate in reversion is considered greater than an estate in possession, though in other respects equal; and with

There is, however, a qualification of this doctrine of merger, viz., that the union in the same individual of both estates must be in the same right.

"If the freehold be in his own right, and he has a term in right of another (*en autre droit*), there is no merger. Therefore, if tenant for years dies, and makes him who hath the reversion in fee his executor, whereby the term of years vests also in him, the term shall not merge; for he hath the fee in his own right, and the term of years in the right of the testator subject to his debts and legacies. So also, if he who hath the reversion in fee marries the tenant for years there is no merger; for he hath the inheritance in his own right, the lease in the right of his wife" (*q*).

But at Common law this qualification of the doctrine extended to those instances only in which one person had the legal ownership in different rights, and in which Common law, as distinguished from equity, took notice that he held in different rights. Of different rights in respect of the mere beneficial or equitable ownership the Common law did not for this purpose take any notice. Therefore, at law, notwithstanding one of two legal estates was held in trust and the other was held beneficially by the same person, the doctrine of merger took effect (*r*), but equity would interpose to support the trust. And now by the Judicature Act, 1873 (*s*), it is enacted:—

> S. 25, § 4. "There shall not after the commencement of this Act" (1st November, 1875) "be any merger by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity."

In treating of an estate for life, it was pointed out (*t*) that the tenant for life, notwithstanding his limited interest, has a right

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regard to terms for years, though the term in reversion be of smaller duration." It was formerly contended that one term would not merge in another term, or, as Coke says (Co. Litt. 273 b), that "one chattel cannot drown another, and years cannot be consumed in years;" but the contrary is settled law: see *Stephens* v. *Bridges*, 6 Madd. 66; 1 Cruise, Dig. 240.

(*q*) 2 Bl. 177. See *Chambers* v. *Kingham*, 10 Ch. Div. 743; and *Re Radcliffe*, [1892] 1 Ch. 227.

(*r*) Preston on Conv., vol. iii., p. 315. And see 6 Cruise, Dig. 466, *et seq.* Merger is there defined as "The annihilation by act of law of the less in the greater of two vested estates, meeting, without any intervening estate, in the same person in the same right; or, if in different rights, meeting in the same person by act of the party and not by mere act of law, and so that the person in whom the estates thus meet in different rights by act of the party, shall have an absolute power of alienation over both estates."

(*s*) 36 & 37 Vict. c. 66. See *Snow* v. *Boycott*, [1892] 3 Ch. 110.

(*t*) *Ante*, p. 41.

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to take wood, and other materials produced by the land, for fuel, repairs, and the like, under the name of "estovers" or "botes"—that is to say, house-bote, fire-bote, plough-bote, and the like (*u*); and is also liable for waste. The same rights belong to the tenant for years; and he is liable for voluntary waste. But there is some doubt as to the liability of a tenant for years for permissive waste in the absence of express stipulation. According to some authorities (*x*) a tenant for years is liable for permissive waste; but if, as is sometimes said, the liability of the tenant for years is in this respect the same as that of a tenant for life (*y*), a tenant for years is not liable for permissive waste in the absence of express stipulation (*z*).

Waste.

A tenant at will appears not to be liable for permissive waste (*a*).

Emblements.

A tenant for years, like a tenant for life, was by the Common law entitled to emblements when the determination of his term was caused by an uncertain event, as the death or cesser of the estate of a lessor who was himself tenant for life or for any other uncertain interest, though not if the term expired by effluxion of time or was determined by the act of the lessée himself. For, where he could have no certain guide whether to sow the land or not, it is only just to him that he should have the crops; in the other case, the period of expiration being known, it was considered to be his own folly if he sowed when aware that he was not to reap the harvest (*b*). By the Landlord and Tenant Act, 1851 (*c*) it is provided that "when the lease or tenancy of any farm or lands held by a tenant at rack-rent (*i.e.*, ordinary rent of the full value), shall determine by the death or cesser of the estate of any landlord entitled for his life or for any other uncertain interest, instead of claims to emblements, the tenant shall continue to hold and occupy such farm or lands until the expiration of the then current year of his tenancy."

Use and occupation.

A contract to pay a fair compensation by way of rent, is implied

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(*u*) See as to these, Williams on Rights of Common, p. 18.

(*x*) Co. Litt. 53 a; *Yellowly* v. *Gower*, 11 Ex. 274; *Harnett* v. *Maitland*, 16 M. & W. 257; *Davies* v. *Davies*, 38 Ch. Div. 499; and the notes to *Green* v. *Cole*, 2 Wms. Saund. 252.

(*y*) See Co. Litt. 53 a; *Yellowly* v. *Gower*, *ubi sup.*; *Harnett* v. *Maitland*, *ubi sup.*

(*z*) See *ante*, p. 44.

(*a*) *Harnett* v. *Maitland*, 16 M. & W. 257.

(*b*) Co. Litt. 55 ab; 1 Cruise, Dig. 233 (s. 18). As to emblements, see *ante*, p. 23.

(*c*) 14 & 15 Vict. c. 25.

by law from the fact that lands or tenements belonging to one person have been occupied by another under an agreement with the former. Where the tenancy is created by simple contract, that is, otherwise than by deed, an action lies for what is called "use and occupation," and the fair and reasonable value of the same will be recoverable; generally, however, the amount of rent and time of payment are determined by express agreement, which is put in writing (*d*).

Original lessee liable for rent, &c., after assignment.

A lease is expressly made subject to the payment of the rent and the observance and performance of certain covenants, amongst which a covenant to pay the rent during the whole term is included (*e*).

"As a matter of contract, the lessee's covenant to pay rent and his other covenants remain binding on him (*f*), during the whole term, notwithstanding any assignment which he may make. On a sale of leasehold land by the lessee, the purchaser is therefore bound to enter into a covenant to indemnify the vendor against non-payment of the rent and non-observance of the covenants of the lease. And the assignee of a lease is bound so to indemnify the lessee, even without such a covenant. The assignee, as such, is liable to the landlord for the rent which may be unpaid, and for the covenants which may be broken during the time that the term remains vested in him, although he may never enter into actual possession, provided that such covenants relate to the premises let; and a covenant to do any act upon the premises, as to build a wall, is binding on the assignee, if the lessee has covenanted for himself *and his assigns* to do the act. But a covenant to do any act upon premises not comprised in the lease cannot be made to bind the assignee. Covenants which are binding on the assignee are said to *run with the land*, the burden of such covenants passing with the land to every one to whom the term is from time to time assigned. But when the assignee assigns to another, his liability ceases as to any future breach. In the same manner the benefit of covenants relating to the land, entered into by the lessor, will pass to the assignee; for, though

Assignee liable until he assigns over.

Covenants which run with the land.

(*d*) See Fos, L. & T. 303, *et seq.* There was at Common law an action of debt for use and occupation; and under the Distress for Rent Act, 1737 (11 Geo. II. c. 19), an action of *assumpsit*; see Smith, L. & T. 199, *et seq.*; and Roscoe, N. P. 323.

(*e*) The common form of the covenant is that the lessee covenants that he, the lessee, his executors, administrators, or assigns, during the said term, will pay the rent. "This," said Lord Esher, M.R. (in *Baynton* v. *Morgan*, 22 Q. B. D. 74, where the covenant was in similar terms), "is a direct promise that certain sums of money shall be paid as rent on certain days during a certain period." See the form of the covenant in Stud. Prec. xiii., p. 27.

(*f*) *Smyth* v. *North*, L. R. 7 Ex. 242; Elph. Introd. 238. Note the distinction between the liability of the lessee by reason of the express covenant and his liability by reason of privity of estate. It was held that if the lessor accepted an assignee as his tenant, he could not afterwards bring an action of debt for rent against the lessee; but he could sue him on his express covenant: see note to *Thursby* v. *Plant*, 1 Wms. Saund. 241; *Baynton* v. *Morgan*, 22 Q. B. D. 74.

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Privity of estate.

no contract has been made between the lessor and the assignee individually, yet, as the latter has become the tenant of the former, a *privity of estate* is said to arise between them, by virtue of which the covenants entered into, when the lease was granted, become mutually binding, and may be enforced by the one against the other. This mutual right is also confirmed by an express clause of the statute (*g*), by which assignees of the reversion were enabled to take advantage of conditions of re-entry contained in leases. By the same statute also, the assignee of the reversion is enabled to take advantage of the covenants entered into by the lessee with the lessor, under whom such assignee claims" (*h*).

When it is said that covenants "run with the land," what is meant is that they are considered by the law to be annexed or appurtenant to, and to pass with the *estates* in the land. The doctrines upon the subject appear to be connected with the distinction between covenants real and covenants personal.

Covenants real —personal.

"Covenants real are those which have for their object something annexed to, or inherent in, or connected with, land or other real property," and "the essential difference between a real and a personal covenant is that a real covenant runs with the land" (*i*). A covenant which runs with the land has been defined to be "such a covenant as would be binding on the assignee of the lessee and which the assignee of the lessor might enforce (*k*); or as one which follows the reversion and the lease, let them go where they will (*l*); the principle being that the covenant relates to the subject-matter of the lease and is such as to be beneficial to the estate of the lessor or of the lessee as the case may be (*m*).

A covenant of this nature may be entered into by either the lessor or the lessee, and its effect in either case is to impose an obligation on the covenantor and to confer a corresponding right on the covenantee. When it is said that a covenant runs "with the land," what is meant, if it is the lessee's covenant, is that the burden of it, *i.e.*, the obligation to perform it, is annexed to the lessee's estate in the land; if it is the lessor's covenant,

(*g*) 32 Hen. VIII. c. 34, s. 2; and see *post*, p. 170.

(*h*) Wms. R. P. 478.

(*i*) 4 Cruise, Dig. 371, s. 23; *ib.* 372, s. 27.

(*k*) *Per* Abbott, C.J., *Vernon* v. *Smith*, 5 B. & Ald. 1.

(*l*) See Wilmot, C.J., *Bally* v. *Wells*, cited (from Wilmot's Notes) in 5 B. & Ald., pp. 3, 7.

(*m*) See *per* Best, J., *Vernon* v. *Smith*, 5 B. & Ald. 10; Shep. T. 176 (where they are called "inherent covenants, *i.e.*, such covenants as do concern the thing granted, and tend to the supportation of it, as, to keep the houses demised in good reparations, or the like").

Covenants which run with the reversion.

that the benefit of it, *i.e.*, the right to enforce it, is annexed to the lessee's estate. Where the benefit of a lessee's covenant or the burden of a lessor's covenant, is annexed to the estate of the lessor, so that the lessor's assign acquires the right to enforce the covenant or the obligation to perform it, as the case may be, such covenant is said to "run with the reversion." By the "land," as distinguished from the reversion, is meant the thing demised by the lease. But the expression "covenant running with the land," is sometimes used to express merely the nature of the covenant, that is to say, that it is of the nature of a real covenant, whether the burden of it be annexed to the land or to the reversion, or, in other words, whether the covenantor be lessee or lessor. For example, a covenant to repair the demised premises is a covenant which runs with the land, and it may be entered into by either the lessee or the lessor. If the lessee covenants, the burden of the covenant runs with the land, *i.e.*, the estate of the lessee, and the benefit of it with the reversion, *i.e.*, the estate of the lessor; if the lessor covenants, the burden runs with the reversion, and the benefit with the land (*n*).

Covenants running with the land.

On the subject of covenants running with the land, the Real Property Commissioners, in their third Report, said :—

Where assigns are bound.

"The authorities lay down, 1st, that, in order to make a covenant run strictly with the land, so as to bind the assignee, or give him the benefit without his being named, it must relate directly to the land, or to 'a thing in existence parcel of the demise': 2ndly, that, where it respects a thing not in existence at the time, but which, when it comes into existence, will be annexed to the land, the covenant may be made to bind the assigns by naming them, but will not bind them unless named; and 3rdly, that when it respects a thing not annexed, nor to be annexed, to the land, or a thing collateral, or in its nature merely

(*n*) It may be pointed out that at law the lessee's covenants bind only persons in whom the very estate of the lessee is vested, and not those who are assigns of the equitable interest only (*e.g.*, a person who is in possession under a mere agreement by the lessee to assign to him; *Cox* v. *Bishop*, 8 De G. M. & G. 815); nor a sub-lessee, for he does not take the estate of the original lessee, but only an interest derived out of it. In equity, however, a lessor may be entitled to enforce negative covenants against a person who is not a legal assign of the lessee's estate, but who derives his title to the possession from the lessee *with notice* of the existence of the covenant: see *Luker* v. *Dennis*, 7 Ch. Div. 227; and, as to underlessees and mere occupiers, *Hall* v. *Ewin*, 37 Ch. Div. 74; *Mander* v. *Falcke*, [1891] 2 Ch. 554.

See, as to covenants in leases running with land, Articles in 31 Sol. J., pp. 212, 229; Foa, L. & T. 321, *et seq.*, where a list is given of covenants which have been held so to run.

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personal, the covenant will not run, that is, it will not bind the assignee nor pass to him even though he is named "(*o*).

"These rules appear to have been originally laid down with reference to leases; but authorities are not wanting, in which they have been treated as applying equally to cases not involving the relation of landlord and tenant (*p*). They are usually laid down as constituting the

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(*o*) These rules are laid down in *Spencer's Case*, 5 Rep. 16; 1 Sm. L. C.

Restrictive covenants between owners in fee simple.

(*p*) The case of covenants as between lessor and lessee must be distinguished from that of covenants entered into as between owners in fee simple: see Dart, V. & P. 862; and *per* Lindley, L.J., 8 Q. B. D. 410; 29 Ch. Div. 781. The burden of a covenant entered into by the owner in fee of one piece of land with the owner in fee of another piece of land, or by the owner of land subject to a rent-charge, with the owner of the rent, cannot (except possibly in the case of a covenant for production) run *at law* with the land so as to bind the assigns of the covenantor; *Austerberry* v. *Corporation of Oldham*, 29 Ch. Div. 750; *Haywood* v. *Brunswick Building Society*, 8 Q. B. D. 403; 1 Smith, L. C., 10th ed., 89, and the cases there cited. Where, however, the covenant is a restrictive or negative covenant: *i.e.*, a covenant not to do something on the land (*London and South Western Railway Co.* v. *Gomm*, 20 Ch. Div. 562; *Haywood* v. *Brunswick Building Society*, 8 Q. B. D. 403); as, for example, not to build on it, or not to carry on specified trades on it, the assign of the purchaser taking the legal estate *with notice*, or taking an equitable estate only, whether with or without notice (see *London and South Western Railway Co.* v. *Gomm*, 20 Ch. Div. 562, at 583, *per* Jessel, M.R.) will be restrained in equity from breaking it (*Tulk* v. *Moxhay*, 2 Ph. 774; *Catt* v. *Tourle*, L. R. 4 Ch. 654; *Zetland* v. *Hislop*, 7 App. Ca. 427), on the principle that a person will not be allowed to use land in a manner inconsistent with a contract entered into by a person through whom he claims and (as to a person taking the legal estate) of which he has notice. It may be added that a covenant affirmative in its terms may be held in effect to imply a negative (see 8 Q. B. D. 409; 20 Ch. Div. 583). A covenant of this nature is not open to objection on the ground that it offends against the rules as to perpetuities (*ante*, p. 102), *London and South Western Railway Co.* v. *Gomm*, 20 Ch. Div. 562; see *Mackenzie* v. *Childers*, 43 Ch. Div. 265, at p. 279. It must, however, be remembered that a provision in the form of a covenant may really amount to a grant of an easement or a *profit à prendre*: *Holmes* v. *Seller*, 3 Lev. 305; *Lord Mountjoy's Case*, 1 Anders. 307; *Northam* v. *Hurley*, 1 El. & Bl. 665; *Rowbotham* v. *Wilson*, 8 H. L. C. 348—and in this case the person who appears to be the covenantee and his assigns are entitled to the easement by virtue of the grant.

The benefit of a covenant cannot run either at law or in equity with land or a rent-charge unless it is really connected with the enjoyment of the land or rent: *Ackroyd* v. *Smith*, 10 C. B. 164; *Bailey* v. *Stephens*, 12 C. B. (N. S.) 91; *Ellis* v. *Mayor of Bridgnorth*, 15 C. B. (N. S.) 52; *Austerberry* v. *Corporation of Oldham*, 29 Ch. Div. 776.

At law no person is entitled to the benefit of a restrictive covenant unless he is in of the same estate as, *i.e.*, claims under, the original covenantee; so that, if the estate of the covenantee is defeated by an appointment under an overriding power, the appointee is not entitled to enforce the covenant; *Roach* v. *Wadham*, 6 East, 289 (see this discussed in the notes to *Spencer's Case*, 1 Smith, L. C.). In equity, however, if the intention that the appointee is to enjoy the benefit of the covenant is clear, this distinction will be disregarded. It is by no means clear whether a purchaser from the covenantee will be able to enforce the covenant unless it appears from his conveyance that it is intended that he should be able to do so: *Renals* v. *Cowlishaw*, 9 Ch. Div. 125; 11 Ch. Div. 866.

whole of the settled law on the subject, and appear to apply equally, whether we consider the burthen, or whether we consider the benefit of covenants."

Where it is necessary to name the assigns of the covenantor in order to bind them, the covenant has usually been framed thus:—

"The said (covenantor) doth hereby for himself, his heirs, executors, administrators, *and assigns*, covenant with the said (covenantee), his executors, administrators, and assigns, that he the said (covenantor), his executors, administrators, or assigns, will, &c."

Covenant to extend to heirs.

By the Conveyancing and Law of Property Act, 1881 (*q*), a covenant made since 31st December, 1881, relating to land of inheritance is to be deemed to be made with the covenantee, his heirs and assigns, and to have effect as if heirs and assigns were expressed; and similarly a covenant relating to land not of inheritance is to be deemed to be made with the covenantee, his executors, administrators, and assigns, and to have effect as if executors, administrators, and assigns were expressed. Similarly it is enacted (*r*) that (if and as far as a contrary intention is not expressed), a covenant, though not expressed to bind the heirs, shall operate in law to bind the heirs and real estate, as well as the executors and administrators, and personal estate,

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Building estate.

Occasionally on the sale of a building estate in lots each purchaser enters into restrictive covenants with the vendor; where this is the case, each purchaser can enforce the covenants of the other purchasers if the restrictions were entered into for his benefit, but not if they were entered into for the benefit of the vendor only: *Nottingham Patent Brick and Tile Co.* v. *Butler*, 15 Q. B. D. 261; 16 Q. B. D. 778; *Everett* v. *Remington*, [1892] 3 Ch. 148; *Re Birmingham and District Land Co. and Allday*, [1893] 1 Ch. 342; *Davis* v. *Corporation of Leicester*, [1894] 2 Ch. 208. In the former case the vendor will, if such is the intention, be unable to release the purchasers from their covenants: *Martin* v. *Spicer*, 34 Ch. Div. 1; S. C., *sub nom. Spicer* v. *Martin*, 14 App. Cas. 12; but if the nature of the property becomes so far changed as to render it inequitable to enforce the covenants the Court will decline to do so: *Duke of Bedford* v. *Trustees of British Museum*, 2 M. & K. 522; *Sayers* v. *Collyer*, 24 Ch. Div. 180; 28 Ch. Div. 103.

See, on all the questions considered in this note, 1 K. & E. 285, *et seq.*; 31 Sol. J. 250, 265, 281, 298; the notes to *Spencer's Case*, 1 Smith, L. C.; S. C. 5 Rep. 16. In that case the lessee had covenanted "for him, his executors and administrators"—not saying "*and assigns*" —that he, "his executors, administrators, *or assigns*" would build a wall on the land demised: and it was held that this form of covenant was not binding on assigns; though, if the lessee had expressly covenanted *for* his assigns, they would have been bound, the covenant being to do an act on the premises demised.

(*q*) 44 & 45 Vict. c. 41, s. 58.

(*r*) *Ib.* s. 59.

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of the person making the same, as if heirs (*s*) were expressed. But the section only applies to covenants made or implied since 31st December, 1881.

The result is that it is not necessary either in the case of the covenantor or of the covenantee to mention the heirs, executors, administrators, or assigns, except in cases where, before the Act, it was necessary to mention the assigns of the covenantor in order to make the burden of the covenant run with the land.

Benefit of lessee's covenants.

As to the rights and obligations of an assignee of the reversion, in other words, as to how far covenants run with the reversion, we will first consider the assignee's right to the benefit of, *i.e.*, his right to enforce, the lessee's covenants, in other words, whether the benefit of a lessee's covenant runs with the reversion.

At Common law only the lessor himself or his heir could take the benefit of the lessee's covenants (*t*).

"Covenants real descend to the heirs of the grantors, who may at any time bring an action upon them, though not named, as in the case of *Lougher* v. *Williams* (*u*). But no stranger could take advantage of a covenant of this kind; so that the grantees of reversions could not enforce the performance of any covenants contained in leases made by the persons under whom they derived. To remedy this, the statute 32 Hen. VIII. c. 34, was made . . . it being thereby enacted that the grantees and assignees of reversions shall have such like and the same advantages, by action only, for not performing the covenants in the said leases, as the lessors or grantors themselves or their heirs or successors might have had" (*x*).

32 Hen. VIII. c. 34.

Though the words of the statute 32 Hen. VIII. c. 34, are general, the Courts have construed them as including only covenants which touch and concern the thing demised, *i.e.*, covenants which run with the land (*y*).

Attornment.

Formerly, in order to complete the title of an assignee of the reversion as against the tenant, so as to enable him to sue the tenant on his covenants, it was necessary that the tenant should

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(*s*) It was never necessary, though usual, to mention executors and administrators, for they were bound at Common law. (Wms. Exors. 1595). Observe that this provision does not make the mention of the "assigns" of the covenantor unnecessary in cases where they are not bound unless named.

(*t*) Smith, L. & T. 449, *et seq.* See the preamble to statute 32 Hen. VIII. c. 34, cited in 1 Wms. Saund. 238, note (2); and see *ib.* 240, note (3).

(*u*) 2 Lev. 92.

(*x*) 4 Cruise, Dig. 375, s. 41; for the words of the statute, see 1 Wms. Saund. 238, 239. See the Act discussed Co. Litt. 215 a. It applies only to leases by deed; *Standen* v. *Christmas*, 10 Q. B. 135.

(*y*) Smith, L. & T. 452. This was so held in *Spencer's Case*, 5 Rep. 18 a; 1 Sm. L. C.; see 4 Cruise, Dig. 376.

attorn to the reversioner, *i.e.*, should acknowledge that he held of him (*z*); and, notwithstanding the statute 32 Hen. VIII. c. 34, attornment was still necessary in order to enable the assignee to sue the tenant until the statute 4 Anne, c. 16 (s. 9), which made the assignment valid without attornment, but at the same time (s. 10) protected any lessee who paid rent to the lessor without having had notice of the assignment of the reversion. Its operation was to complete the title of the assignee and to protect the tenant against the breach of a condition for payment of rent (*a*), *i.e.*, by requiring notice to the tenant in lieu of attornment.

Destruction of immediate reversion.

It should here be noticed that at Common law the right to enforce the lessee's covenants was regarded as annexed to the original reversion, *i.e.*, the estate out of which the lessee's term was derived, and it followed that, if that reversion by any means ceased to exist, the right annexed to it was destroyed. Thus, if A. seised in fee granted a lease for ninety-nine years to B., and B. then granted an underlease for a shorter term to C., the covenants entered into by C. were incident to the immediate reversion, *i.e.*, to B.'s term. Now if B. surrendered his term to A., or if A. conveyed his reversion in fee to B., B.'s term would be merged and destroyed. Neither A. nor B. could thenceforth sue upon the lessee's covenants in C.'s lease (*b*); and, on the other hand, neither A. nor B. would be liable to perform the covenants by the lessor, for they also were held to be incident to the original reversion only. To remedy these inconveniences the Real Property Act, 1845, enacted in effect that when the reversion on a lease (made before or after the Act) should after 1st October, 1845, be surrendered or merge, the covenants in the lease should be annexed to and run with the reversionary estate for the time being immediately expectant on the term (*c*).

As to leases made after 1881, the Conveyancing and Law of Property Act, 1881, provides that the rent reserved and the benefit of the lessee's covenants " having reference to the subject-

(*z*) As to attornment, see Co. Litt. 309 a; Wms. R. P. 315; Smith, L. & T. 446.

(*a*) See *Moss* v. *Gallimore*, 1 Sm. L. C. 497; *Scaltock* v. *Harston*, 1 C. P. D. 106, 110; where it was held that it is not necessary to give notice to the lessee of the assignment of the reversion in order to enable the assignee to re-enter for breach of a covenant to repair.

(*b*) See Wms. R. P. 316; Smith, L. & T. 366.

(*c*) 8 & 9 Vict. c. 106, s. 9. See observations in Dav. Conc. Prec., p. 18. The right of grantees of the reversion of part only of the land to avail themselves of the benefit of a condition of re-entry is dealt with *post*, p. 174.

matter" of the lease "shall be annexed and incident to and shall go with the reversionary estate in the land immediately expectant on the term granted by the lease" (*d*).

Burden of lessor's covenants.

As to the burden of covenants by the lessor, the second section of the statute 32 Hen. VIII. c. 34, made assignees of the reversion liable to be sued by the lessee or his assigns (*e*). This section, like the first section, is general in its terms; but, as we have observed above, the Courts confined the operation of the statute to covenants touching the subject-matter of the lease. As to leases made after 1881, the Conveyancing and Law of Property Act, 1881, provides that the obligation of such covenants, entered into by the lessor, shall be annexed and incident to the reversion immediately expectant on the term (*f*).

Benefit of lessor's covenants.

As to the right of the assignee of a lease to the benefit of a lessor's covenant, relating to the subject-matter of the demise, it appears that such covenants ran with the land at Common law (*g*); and, as to leases made after 1881, the matter is regulated by the Conveyancing Act, 1881 (*h*), which enacts that "the obligation of a covenant entered into by a lessor with reference to the subject-matter of a lease may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise."

Proviso for re-entry (*i*).

It is usual to secure the payment of the rent and the observance and performance of the covenants by inserting in the lease a proviso or condition (*k*) for re-entry by the lessor, on non-payment of the rent or breach of any of the covenants, and for the cesser of the lease upon such re-entry. On the ground that such a condition was entire and indivisible, the law formerly was, that, if the landlord gave a licence to do what otherwise

Licence or waiver.

(*d*) 44 & 45 Vict. c. 41, s. 10.

(*e*) See Smith, L. & T. 451.

(*f*) 44 & 45 Vict. c. 41, s. 11.

(*g*) See the 4th and 6th Resolutions in *Spencer's Case*, 5 Rep. 16; S. C. 1 Sm. L. C.; and 4 Cruise, Dig. 372, ss. 30, 31.

(*h*) 44 & 45 Vict. c. 41, s. 11.

(*i*) Elph. Introd. 230, where it is pointed out that, "in the absence of such a proviso, the non-payment of rent, or a breach of covenant, would not cause a forfeiture of the lease, but would give only a right of action for the rent or for damages."

(*k*) "*Provisoes* and *conditions* are words signifying almost exactly the same thing, a condition being denominated a proviso merely on account of the word with which it usually begins; and each of these expressions alike signifies some quality annexed to a real estate, by which it may be defeated, enlarged, or created upon an uncertain event. The only difference between them is that a *proviso* is always in express words, whereas there are certain conditions which the law implies, even though they are not mentioned;" Smith, L. & T. 137. See Shep. T. 121, 122; Co. Litt. 203 b.

would have been ground for forfeiture (*e.g.*, to assign or underlet where the lease contains a covenant not to assign or underlet), or if, after any breach he actually, *i.e.*, by some positive act, as distinguished from mere standing by or acquiescence (*l*), waived the forfeiture, the proviso for re-entry was destroyed, and the landlord could not take advantage of any subsequent breach (*m*). But by the Law of Property Amendment Act, 1859 (*n*), commonly known as Lord St. Leonards' Act, it was enacted as follows:—

Restriction on effect of licence:

S. 1. "Where any licence to do any act which without such licence would create a forfeiture, or give a right to re-enter under a condition or power reserved in any lease heretofore granted or to be hereafter granted, shall at any time after the passing of this Act be given to any lessee or his assigns, every such licence shall, unless otherwise expressed, extend only to the permission actually given, or to any specific breach of any proviso or covenant made or to be made, or to the actual assignment, under-lease, or other matter thereby specifically authorised to be done, but not so as to prevent any proceeding for any subsequent breach (unless otherwise specified in such licence); and all rights under covenants and powers of forfeiture and re-entry in the lease contained shall remain in full force and virtue, and shall be available as against any subsequent breach of covenant or condition, assignment, under-lease, or other matter, not specifically authorised or made dispunishable by such licence, in the same manner as if no such licence had been given; and the condition or right of re-entry shall be and remain in all respects as if such licence had not been given, except in respect of the particular matter authorised to be done.

—of partial licence.

S. 2. "Where in any lease heretofore granted, or to be hereafter granted, there is or shall be a power or condition of re-entry on assigning or under-letting or doing any other specified act without licence, and a licence at any time after the passing of this Act shall be given to one of the several lessees or co-owners to assign or underlet his share or interest, or to do any other act prohibited to be done without licence, or shall be given to any lessee or owner, or any one of several lessees or owners, to assign or underlet part only of the property, or to do any other such act as aforesaid in respect of part only of such property, such licence shall not operate to destroy or extinguish the right of re-entry in case of any breach of the covenant or condition by the co-lessee or co-lessees, or owner or owners, of the other shares or interests in the property, or by the lessee or owner of the rest of the property (as the case may be) over or in respect of such shares or interests or remaining property, but such right of re-entry shall remain in full force over or in respect of the shares or interests or property not the subject of such licence."

(*l*) *Doe* d. *Sheppard* v. *Allen*, 3 Taunt. 78; *Perry* v. *Davis*, 3 C. B. (N. S.) 769.

(*m*) See *Dumpor's Case*, and notes thereto, 1 Sm. L. C., where waiver of the condition itself is distinguished from waiver of a particular breach.

(*n*) 22 & 23 Vict. c. 35.

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Waiver.

As regards waiver, it was enacted by the Law of Property Amendment Act, 1860 (*o*), that:—

> S. 6. "Where any actual waiver of the benefit of any covenant or condition in any lease on the part of any lessor, or his heirs, executors, administrators, or assigns, shall be proved to have taken place after the passing of this Act in any one particular instance, such actual waiver shall not be assumed or deemed to extend to any instance or any breach of covenant or condition other than that to which such waiver shall specially relate, nor to be a general waiver of the benefit of any such covenant or condition, unless an intention to that effect shall appear."

Implied waiver.

Waiver of the landlord's right to take advantage of the forfeiture may be implied, where he, with knowledge of the forfeiture, has received rent accrued since the breach of the condition (*p*). In reference to such implied waiver, by receipt of rent, it should be observed that it has been held that, where money is paid as rent under a lease, a mere protest that it is not received as rent, and is accepted without prejudice to the right to insist upon a prior forfeiture, cannot countervail the fact of such receipt (*q*).

Effect of severance of reversion on proviso for re-entry.

Grantees of the reversion (*r*) of part only of the land could not previously to the passing of the Act next referred to take advantage of the benefit of a condition of re-entry; as if the lease were of three acres, reserving a rent upon condition, and the reversion was granted of two acres, the rent would be apportioned by the act of the parties, but the condition was destroyed, for that it was "entire and against common right" (*s*).

By the Law of Property Amendment Act, 1859 (*t*), commonly known as Lord St. Leonards' Act, it was enacted as follows:—

Apportionment of condition

> S. 3. "Where the reversion upon a lease is severed, *and the rent or other reservation is legally apportioned* (*u*), the assignee of

(*o*) 23 & 24 Vict. c. 38.

(*p*) Elph. Introd. 235. See, as to waiver by acceptance of rent, Smith, L. & T. 142; Fos. L. & T. 514.

(*q*) *Croft* v. *Lumley*, 6 H. L. C. 672; and see *Davenport* v. *The Queen*, 3 App. Cas. 115, a decision of the Judicial Committee of the Privy Council and therefore not binding on the English Courts: see *Leak* v. *Scott*, 2 Q. B. D. 376, for an instance in which the Court of Appeal declined to follow a decision of the Judicial Committee.

(*r*) *I.e.*, of the reversion in part of the land, as distinguished from a grantee of part of the reversion, *i.e.*, the *estate* in reversion, *e.g.*, where a reversioner in fee simple on a lease for years grants an estate for life to a third person (see Fos. L. & T. 333). The latter case was held to be within 32 Hen. VIII. c. 34; see Co. Litt. 215 a: *Wright* v. *Burroughes*, 3 C. B. 685; Hood & Challis, note to s. 10. p. 50.

(*s*) Co. Litt. 215 a.

(*t*) 22 & 23 Vict. c. 35.

of re-entry on severance of the reversion.

each part of the reversion shall, in respect of the apportioned rent or other reservation allotted or belonging to him, have and be entitled to the benefit of all conditions or powers of re-entry (*x*) for non-payment of the original rent or other reservation, in like manner as if such conditions or powers had been reserved to him as incident to his part of the reversion in respect of the apportioned rent or other reservation allotted or belonging to him."

As to leases made after 31st December, 1881, the Conveyancing and Law of Property Act, 1881 (*y*), provides for the apportionment of all conditions and rights of re-entry where the reversion is severed, or where there is an avoidance or cesser in any manner of the term as to part of the land. This enactment, it will be observed, is not confined to conditions of re-entry for non-payment of rent. Reference has been made above (*z*) to the provisions of the Act making the rent and benefit of the lessee's covenants and the obligation of the lessor's covenants run with the reversion; and these provisions are made to apply in case of the severance of the reversionary estate (*a*).

Relief against forfeiture (*c*).

A condition of re-entry was, as has been observed (*b*) "a very serious instrument of oppression in the hands of the landlord, when the property comprised in the lease was valuable, and the tenant by mere inadvertence might have committed some breach of covenant."

By the Law of Property Amendment Act, 1859 (*d*), a limited power was given to Courts of Equity to relieve against forfeiture for breach of a covenant or condition to insure against fire; and this power was extended to the superior Courts of Common Law by the Common Law Procedure Act, 1860 (*e*). These enactments have, however, been repealed by the Conveyancing and Law of Property Act, 1881 (*f*); by which, as modified by the

(*a*) As to apportionment of rent on severance by assignment of the reversion in part of the land, see 3 Cruise, Dig. 303—304; *Bliss* v. *Collins*, 5 B. & Ald. 876; S. C. 1 J. & W. 426; from which it appears that as between assignor and assignee the rent is apportionable at Common law, but that the apportionment is not binding on the lessee without his consent or the verdict of a jury. And the rent cannot be apportioned by alienation of the lessee; *Mayor of Swansea* v. *Thomas*, 10 Q. B. D. 48.

(*x*) Observe the difference between apportionment of the rent, and apportionment of the benefit of a condition: the latter was not possible at Common law.

(*y*) 44 & 45 Vict. c. 41, s. 12.

(*z*) *Ante*, pp. 171, 172.

(*a*) 44 & 45 Vict. c. 41, ss. 10, 11.

(*b*) Wms. R. P. 481.

(*c*) Elph. Introd. 232.

(*d*) 22 & 23 Vict. c. 35, ss. 4—9.

(*e*) 23 & 24 Vict. c. 126, s. 2.

(*f*) 44 & 45 Vict. c. 41, s. 14.

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Conveyancing and Law of Property Act, 1892 (*g*), it is enacted, in regard to all leases whether made before or after the commencement of the Act, and notwithstanding any stipulation to the contrary, that (with certain exceptions) a right of re-entry or forfeiture, under any proviso or stipulation in a lease, for a breach of any covenant or condition, shall not be enforceable until after service by the lessor on the lessee of a notice (*h*) specifying the breach, and, if it is capable of remedy, requiring him to remedy it, and in any case requiring him to make compensation in money for the breach; and until failure by the lessee within reasonable time thereafter to remedy it, if capable of remedy, and to make reasonable compensation in money to the satisfaction of the lessor. And where the lessor is proceeding to enforce such right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the Court for relief; and the Court may grant or refuse relief, on such terms as, having regard to all the circumstances, it thinks fit.

Cases excepted from relief.

The exceptions to which these provisions for relief do not apply are, (1) a covenant or condition against the assigning, underletting, parting with the possession, or disposing of the land leased (*i*); (2) a condition for forfeiture on the bankruptcy of the lessee (*k*), or on taking in execution of his interest where the lease is of agricultural or pastoral land, mines or minerals, a house used or intended to be used as a public-house or beershop, a house let as a dwelling-house with the use of any furniture, books, works of art, or other chattels not being in the nature of fixtures; or of any property with respect to which the personal qualifications of the tenant are of importance for the preservation of the value or character of the property, or on the ground of neighbourhood to the lessor, or to any person holding under him. In the case of any lease not of the character above described, the exception (that is, the exclusion of the right to relief from forfeiture) applies only after the expiration of one year from the date of the bankruptcy or taking in execution, and only in case the lessee's

(*g*) 55 & 56 Vict. c. 13, ss. 2—5.

(*h*) The notice must be specific: *Fletcher* v. *Nokes*, [1897] 1 Ch. 271.

(*i*) *Barrow* v. *Isaacs*, [1891] 1 Q. B. 417. But (Conv. & Law of Prop. Act, 1892, s. 3), unless the lease contains a provision to the contrary, the covenant or condition is to be deemed subject to a proviso that no fine shall be payable for a licence to break it. See, as to what is a fine within this provision, *Re Cook's Contract*, [1897] 1 Ch. 9.

(*k*) *Ex parte Gould*, 13 Q. B. D. 454.

interest is not sold within that year (*l*); and (3) in case of a mining lease, a covenant or condition for allowing the lessor to have access to or inspect books, accounts, records, weighing machines, or other things, or to enter or inspect the mine or the workings thereof (*m*).

The above provisions of the Acts apply to under-leases and grants at fee farm rents or securing rents by conditions (*n*); but they are not to affect the law relating to re-entry, or forfeiture, or relief, in case of non-payment of rent (*o*).

Re-entry for non-payment of rent— "legal demand."

Formerly re-entry for non-payment of rent had in all cases to be preceded by a legal demand of the rent; *i.e.*, a demand made in a formal manner. The law required that the demand should be made upon the land itself; that it should specify the precise amount due, and should be made at a convenient time, before sunset of the last day on which it should be paid according to the condition of re-entry (*p*). But, under the Common Law Procedure Act, 1852 (*q*), where one half-year's rent is in arrear, and the lessor has a right to re-enter for non-payment thereof, he may, "without any formal demand or re-entry," serve a writ in ejectment (*r*) for the recovery of the demised premises, which service is to stand in place of a demand and re-entry; and upon proof at the trial that the half-year's rent was due, that no sufficient distress could be found on the premises, and that the lessor had a right to re-enter, the lessor recovers judgment and execution, *i.e.*, is put into possession (*s*), and holds the demised premises discharged from the lease, unless the lessee pays the

(*l*) This is the effect of the modifications made by s. 2, sub-ss. (2) and (3) of the Conv. and Law. of Prop. Act, 1892, in the operation of s. 14 of the Conv. and Law of Prop. Act, 1881.

(*m*) 44 & 45 Vict. c. 41, s. 14 (6), (i.) and (ii.).

(*n*) 44 & 45 Vict. c. 41, s. 14 (3). But an under-lessee has not a right to relief under the section as against the superior landlord; *Nind* v. *Nineteenth Century Building Society*, [1894] 2 Q. B. 226. See as to relief of under-lessees, *Wardens of Cholmeley School* v. *Sewell*, [1894] 2 Q. B. 906; *Imray* v. *Oakshette*, [1897] W. N. (56) 6.

(*o*) *Ib.*, sub-s. (8). As to relief in such cases, see the note to this clause in Hood & Challis, p. 61; *Howard* v. *Fanshawe*, [1895] 2 Ch. 581, p. 587.

(*p*) See *Duppa* v. *Mayo*, 1 Wms. Saund., at 287; *Phillips* v. *Ridge*, L. R. 9 C. P. 49, note; Smith, L. & T. 164.

(*q*) 15 & 16 Vict. c. 76, s. 210 (replacing the similar provisions of 4 Geo. II. c. 28). Actions to recover possession of land may be brought in a County Court, where neither the value of the lands nor the rent exceeds £50 per annum; County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 59; *ib.* ss. 138, *et seq.* (as to recovery of small tenements).

(*r*) Now an action to recover possession of land. See R. S. C. Order XLVII.

(*s*) See R. S. C. Order XLII., r. 5; and writ of possession, R. S. C. App. H. No. 8.

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rent and arrears and full costs, and proceeds for relief in equity within six months. The lessee may within six months after the lessor has obtained judgment and execution, obtain relief against the forfeiture in a Court of Equity, upon the terms of paying into Court such sum as the lessor swears to be due and costs (*t*). It is also provided (*u*) that if the tenant, at any time before the trial in ejectment, pays or tenders the rent and costs, all further proceedings in the ejectment shall cease; and by the Common Law Procedure Act, 1860 (*x*), it is enacted that the same relief, upon the same terms as to payment of rent, costs and otherwise, may be given by the superior Courts of Common Law, upon rule or summons, in a summary manner. It will be observed that the statutes apply only where a half-year's rent is due, and the lease contains a power of re-entry on non-payment of rent. In every well-drawn lease, therefore, a right of entry is given for non-payment of rent, "whether the rent shall have been legally demanded or not."

Actual entry on the land is not necessary in order to determine the tenancy. It is sufficient that some act be done by the landlord, showing his intention to determine it (*y*). As Lord Mansfield said (*z*):—

> "The reason of the thing is agreeable to the practice" (namely, that entry is unnecessary); "for it is absurd to entangle men's rights in nets of form without meaning; and an ejectment, being a mere creature of the Court, passed for the purpose of bringing the right to an examination, an actual entry can be of no service."

Forcible entry.

Where an actual re-entry is made, it must be in a peaceable manner, for "it is part of the law that no one shall, with force and violence, assert his own title" (*a*); and forcible entry was made an indictable offence by 5 Rich. II., stat. i., c. 8, which provided that, even where there is a legal right of entry, no man shall enter with strong hand, nor with multitude of people, but

(*t*) 15 & 16 Vict. c. 76, s. 211.

(*u*) *Ib.* s. 212. This applies where the lessor has recovered possession without the assistance of any Court; *Howard* v. *Fanshawe*, [1895] 2 Ch. 581.

(*x*) 23 & 24 Vict. c. 126, s. 1; *Croft* v. *London and County Banking Co.*, 14 Q. B. D. 347.

(*y*) *Doe* d. *Phillips* v. *Rollings*, 4 C. B. 196, *et seq.*

(*z*) In *Goodright* d. *Hare* v. *Cator* (quoted in *Doe* v. *Rollings*, 4 C. B., at p. 198), where the question was whether an actual entry was necessary to maintain an ejectment on a clause of re-entry for non-payment of rent: and see *Baylis* v. *Le Gros*, 4 C. B. (N. S.) 537.

(*a*) *Per* Lord Kenyon, C.J., *R.* v. *Wilson*, 8 T. R., at p. 361.

only in a peaceable and easy manner. If he cannot do so, he must resort to the Courts (*b*).

Increase of rent.

Before passing from the subject of rent and covenants, it should be observed that, although the lessor can reduce the amount of rent, he cannot increase it during the lease. Thus, supposing a breach of covenant by assignment without licence, and the lessor willing to waive the right of re-entry on condition of an increased rent, to which both parties agree: this can only be carried out by surrender of the existing lease, and grant of a new one at the increased rent. A landlord, who had demised premises for a term of fifty years at £50 a year, agreed with his tenant to lay out £50 in making improvements on them, the tenant undertaking to pay an increased rent of £5 per annum during the remainder of the term (*c*). It was held that the landlord, having spent the money, could recover arrears of £5 per annum as upon a personal contract; but, said Littledale, J.:—

"It is not rent in the legal sense and understanding of the word rent. It could not be distrained for, for there is no lease which embraces it; the lease is for £50 a year, and there is no lease at £55. If there be a power of re-entry for non-payment of the rent, as is probably the case, there could be no ground for enforcing it in respect of the additional £5. The assignee of the term could not be charged with the increased rent; the assignee of the reversion could not claim it, because it is not annexed to the reversion. If the lessor should die, the rent of £50 would go to his heir or devisee, but the right to this additional £5, being a mere matter of personal contract, would go to his executor. The only way in which it could be taken to be rent would be that this contract creates a new demise at an increased rent, and that, therefore, by operation of law, the old lease is surrendered by such new demise: but it could never be supposed to be in the contemplation either of the landlord or the tenant that the old lease should be at an end, and that instead of it a new lease should be created, which, being only by parol, could only have the effect of a lease at will" (*d*).

Liability of executor or administrator.

It will be remembered that the lessee's covenant is to pay rent during the whole term. The personal representative of an original

(*b*) *Edwick* v. *Hawkes*, 18 Ch. Div. 199. See further, as to forcible entry, Co. Litt. 257 b; Com. Dig. s.v. *Forceable Entry*; *Beddall* v. *Maitland*, 17 Ch. Div. 174 (where it was held that there is no civil right of action for a forcible entry); Smith, L. & T. 384; Pollock on Torts, pp. 342, *et seq.*; *Jones* v. *Foley*, [1891] 1 Q. B. 730; Lightwood on Possession of Land, Ch. VII.

(*c*) *Donellan* v. *Read*, 3 B. & Ad. 899.

(*d*) But as to reservation of additional rent in a lease on breach of covenant, see *Weston* v. *Managers of Metropolitan Asylum District*, 8 Q. B. D. 387; affirmed on appeal, 9 Q. B. D. 404.

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lessee is therefore liable, if sued in his representative capacity, for the rent, but only to the extent of the assets; and, if he enter and take possession, he may be also sued personally, as being an assignee of the lease by operation of law (*e*).

The liability of an executor or administrator, in his representative capacity, in respect of the covenants and agreements contained in a lease, is now limited by the Law of Property Amendment Act, 1859 (*f*), so as to enable him to assign the lease to a purchaser, and distribute the assets of his testator or intestate.

The provision is as follows:—

22 & 23 Vict. c. 35.

S. 27. "Where an executor or administrator, *liable as such* to the rents, covenants, or agreements, contained in any lease or agreement for a lease, granted or assigned to the testator or intestate whose estate is being administered, shall have satisfied all such liabilities under the said lease or agreement for a lease as may have accrued due and been claimed up to the time of the assignment hereafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the lessee to be laid out on the property demised, or agreed to be demised, although the period for laying out the same may not have arrived, and shall have assigned the lease or agreement for a lease to a purchaser thereof, he shall be at liberty to distribute the residuary personal estate of the deceased to and amongst the parties entitled thereto respectively, without appropriating any part, or any further part (as the case may be), of the personal estate of the deceased to meet any future liability under the said lease or agreement for a lease; and the executor or administrator so distributing the residuary estate shall not, after having assigned the said lease or agreement for a lease, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said lease or agreement for a lease; but nothing herein contained shall prejudice the right of the lessor or those claiming under him to follow the assets of the deceased into the hands of the person or persons to or amongst whom the said assets may have been distributed."

Evidence on

In the case of a sale of land held on lease, it is now provided

(*e*) As to the liability of an executor or administrator, see Smith, L. & T. 477, *et seq.*; 1 Wms. Saund. 240 (p. 301, ed. 1871); Foa, L. & T. 339; and *Re Bowes, Strathmore* v. *Vane*, 37 Ch. Div. 128, from which it appears that, if sued as assignee of the lease, he may protect himself from liability beyond the actual profits or yearly value of the premises; *i.e.*, the amount of rent which he might have got by using reasonable diligence. See *Rendall* v. *Andreae*, 61 L. J. Q. B. 630.

(*f*) 22 & 23 Vict. c. 35, s. 27. See *Smith* v. *Smith*, 1 Dr. & Sm. 384; and *Dodson* v. *Sammell*, 1 Dr. & Sm. 575.

sale of lease of performance of covenants.

by the Conveyancing and Law of Property Act, 1881 (*g*), that on production of the receipt for the last payment due for rent before the date of actual completion of the purchase, the purchaser shall assume, unless the contrary appears, that all the covenants and provisions of the lease have been duly performed and observed up to such date.

Under-lease.

Unless restrained by express covenant (and such restrictive covenant is not a "usual" covenant) (*h*), the tenant for a term may, without leave from the lessor, make an under-lease for any part less than the whole (*i*) of his term; and the under-lessee becomes his tenant—not tenant to the lessor, for there is no privity between them.

Evidence on sale of under-lease of performance of covenants.

In the case of a sale of land held by under-lease, a provision (corresponding to that above referred to in the case of a sale of land held on lease), is made by the Conveyancing and Law of Property Act, 1881 (*j*), that on production of the receipt for the last payment due for rent under the under-lease, before the date of actual completion of the purchase, the purchaser shall assume, unless the contrary appears, that all the covenants and provisions of the under-lease have been duly performed and observed up to such date; and further, that all rent due under every superior lease, and all the covenants and provisions of every superior lease, have been paid and duly performed and observed up to that date.

Long terms of years.

Under the English system of conveyancing, long terms of years, *e.g.*, 100, 500, or 1,000 years, are frequently created for the purpose of securing the payment of money by charging the land with it. Thus, where by a strict settlement on marriage, a life estate is limited to the husband, with remainder in tail to his eldest son, and it is desired to make provision, by providing "portions," as they are called, for younger children, it is usual to limit an estate to trustees for a long term of years, for the purpose of securing the portions (*k*). The result is, that the

—to secure portions.

(*g*) 44 & 45 Vict. c. 41, s. 3 (4). This does not apply to a peppercorn rent, *In re Moody and Yates' Contract*, 28 Ch. Div. 661; 30 Ch. Div. 344.

(*h*) Dart, V. & P. 192, referring to *Buckland* v. *Papillon*, L. R. 2 Ch. 67, and *Hampshire* v. *Wickens*, 7 Ch. Div. 555. See also *Re Lander and Bagley*, [1892] 3 Ch. 41.

(*i*) An under-lease for the whole of the term amounts to an assignment: *Beardman* v. *Wilson*, L. R. 4 C. P. 57; and see the earlier cases reviewed in Platt on Leases, vol. i., *ad init.* A rent may be reserved though there is no reversion; *Williams* v. *Hayward*, 1 E. & E. 1040.

(*j*) 44 & 45 Vict. c. 41, s. 3 (5).

(*k*) This term is limited so as to commence from the death of the tenant for life but to precede the estates tail; see Stud. Prec., xxxviii., p. 88.

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lands become charged with the portions, which can at any time be raised by the trustees by a mortgage of the term (*l*), and the persons succeeding to the estate take it subject to this burthen (*m*).

Proviso for cesser and assignment of satisfied terms.

Formerly, when the purposes for which a term had been created were fulfilled, or had come to an end, the term itself was sometimes made to cease by means of an express "proviso for cesser" in the deed creating the term (*n*); but sometimes it was kept alive, and, in case of (*e.g.*) the purchase of the fee simple, it was assigned to a trustee for the purchaser in trust to attend the inheritance, the effect of which was to protect him against any incumbrance (*e.g.*, a rent-charge), created subsequently to the term, and of which on purchasing he had no notice (*o*) and even if he had notice when the term was to be used as a protection against any claim by the vendor's wife to dower (*p*).

Satisfied Terms Act, 1845.

But now, by the Satisfied Terms Act, 1845 (*q*), when the purpose of the term is fulfilled or at an end, it generally ceases, *ipso facto*, to exist, and cannot be assigned in trust for a purchaser (*r*). It may, however, be released by the beneficiaries, or surrendered by the termor; or, where there is any doubt as to the person in whom the immediate reversion expectant on the term is vested, assigned to a trustee that it may cease (*s*).

As to dealing with the term by way of release, Mr. Davidson says (*t*):—

"This method of dealing with and getting rid of a term is very commonly and efficaciously adopted where all the parties beneficially interested in the monies secured by the term are able and willing to join

(*l*) See form in Dav. Conc. Prec., lxiv., p. 254.

(*m*) See the analysis of a strict settlement in Elph. Introd. 360; and see form of trusts of a term to raise portions in Stud. Prec. 89; 2 K. & E. 559.

(*n*) See form of proviso for cesser in Dav. Conc. Prec., p. 256. Its operation depends on the doctrine that, though a freehold estate could not at Common law (*i.e.*, apart from the Statute of Uses) be made to cease by a mere direction of the parties, yet an estate for years could be made to determine *ipso facto* on the performance of a particular act: 1 Cruise, Dig. 227.

(*o*) See Wms. R. P. 501, *et seq.*; Dart, V. & P. 576. As to the former law with respect to attendant terms, see 1 Cruise, Dig. 418, *et seq.*

(*p*) Wms. R. P. 503.

(*q*) 8 & 9 Vict. c. 112; see the observations on this Act in Dav. Conc. Prec., pp. 21, *et seq.*

(*r*) The Act does not apply to copyholds, or customary lands, or leaseholds, by sub-demise: see 2 Dav. Prec. i. 306, note, and 672, note.

(*s*) See form of surrender, 2 Dav. Prec. i., 304; of release and of assignment in trust, *ib.* 310, 311.

(*t*) Dav. Prec., vol. ii., Part I., p. 310, note.

in the conveyance; and it may save considerable expense by avoiding the necessity of tracing the representation to the term, and procuring the concurrence of the trustees. The purchaser must, however, satisfy himself that the trustees, whose concurrence he thus dispenses with, have no costs secured to them by the term unpaid, lest the term should not be really satisfied; and, as a general rule, it will not be safe to rely on this method of extinguishing a term if there have been any dealings with the term in which costs may have been incurred."

The Act itself deals first, with satisfied terms of years, which, either by express declaration or by construction of law, were on 31st December, 1845, attendant upon the inheritance or reversion of any lands; secondly, with terms subsisting at the date of the passing of the Act, or thereafter to be created, becoming satisfied *after* the 31st December, 1845, and which, either by express declaration or by construction of law, should after that day become attendant upon the inheritance or reversion. As to the first, it provided that every such term should absolutely cease and determine; except that every such term attendant by express declaration should, notwithstanding, afford to every person the same protection as it would have afforded if it had continued to subsist, and for such purpose should be considered in law and equity a subsisting term. As to the second, it provided that every such term, upon becoming so attendant, should immediately cease.

The meaning of a term being "satisfied" within the Act of Parliament was much discussed in a case in 1872 (*u*), from which it seems that a term is not satisfied within the meaning of the Act so long as there remains any useful purpose beneficial to the owner of the term, and consistent with the trust on which, at the date of the transaction, the term was held (*x*); in other words, the term does not become satisfied within the meaning of the Act, except when the beneficial interest in the whole charge secured by the term, and the beneficial interest in the whole estate, are united and merged in one person (*y*). The facts in the case were:—A. being lessee of land for 99 years, created a mortgage term, which ultimately became vested in a trustee for the mortgagee, and A. subsequently acquired the fee. He

(*u*) *Anderson* v. *Pignet*, L. R. 8 Ch. 180; and see Dav. Conc. Prec., pp. 23, *et seq.*, where it is said that the expression "satisfied term" is generally understood to mean a term, the trusts, purposes, or objects of which have been performed or fulfilled, or have become incapable of taking effect.

(*x*) *Per* Lord Selborne, L.C.

(*y*) *Per* James, L.J.

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afterwards became bankrupt. In pursuance of an agreement between the assignees in bankruptcy of his estate, himself, and the mortgagee, a deed was executed by which the mortgagee released the mortgage debt, and the fee simple was conveyed to the mortgagee freed and discharged from all equity of redemption. It was intended that the wife of A. (who was married in 1832) should join in the deed for the purpose of releasing her dower; but she refused to execute it, and after the death of A. she filed her bill to enforce her right to dower. It was held that the term was not satisfied, but afforded the purchaser protection against the plaintiff's right to dower. It was added by Lord Selborne, L.C.:—

"I think it right to say, that when I find an express declaration in a deed that a term not previously satisfied shall, upon becoming satisfied, become attendant upon the inheritance conveyed to a particular purchaser, to be assigned and disposed of and held for his benefit, I do not think the effect of the statute, according to the true construction, is to defeat that trust or to make the term cease for the benefit of somebody else who has not any part or share or interest in the inheritance which is conveyed by that particular deed."

Enlargement of residue of long term into fee simple.

A long term of years not unfrequently exists which is in value nearly equivalent to the fee simple, and at the expiration of which evidence of title to the reversion will almost certainly, from the lapse of time, have disappeared. "The usual origin of a long term," it has been observed, "is a mortgage by demise (*z*)

(*z*) Under Lord Cranworth's Act (23 & 24 Vict. c. 145, s. 15), it was provided that the person exercising the power of sale by that Act conferred on mortgagees should have power by deed to convey or assign to and vest in the purchaser the property sold, *for all the estate and interest therein which the person who created the charge had power to dispose of*, except that in the case of copyhold hereditaments the beneficial interest only should be conveyed to and vested in the purchaser by such deed. (See as to this exception *Re Solomon and Meagher*, 40 Ch. Div., at p. 510.) In *Hiatt* v. *Hillman*, 19 W. R. 694, it was held that the effect of this section was to enable mortgagees, to whom leaseholds had been mortgaged by demise, to assign to a purchaser, on a sale under the statutory power, the whole of the original term, and not only the term demised; and in *Re Solomon and Meagher* (*ubi sup.*), to enable an equitable mortgagee to convey the legal estate; and it would seem that the enactment would enable a mortgagee by demise of freeholds to convey the freehold interest, and the personal representative of a mortgagee in fee to convey the legal estate to a purchaser (2 Dav. Prec. ii. 88). The above provision was, however, repealed by s. 71 of the Conv. and Law of Prop. Act, 1881 (44 & 45 Vict. c. 41), and under s. 21 of the same Act, it is provided, as under the ordinary power of sale in a mortgage deed, that "a mortgagee exercising the power of sale conferred by this Act shall have power, by deed, to convey the property sold, *for such estate and interest therein as is the subject of the mortgage*, freed

where the right of redemption has been foreclosed, or has been barred by possession and lapse of time. The fact that the land is not freehold is often overlooked, complication of title arises, and the intentions of a testator are sometimes frustrated, the leasehold interest passing under a gift not intended to include it" (*a*).

Now, by the Conveyancing and Law of Property Act, 1881 (*b*), it is enacted that any of the persons therein specified may, subject to the restrictions therein specified, by deed enlarge the term into a fee simple where there is a residue unexpired of not less than 200 years, such term, as originally created, having been for not less than 300 years; provided that it is without any trust or right of redemption, affecting the term, in favour of the freeholder or other person entitled in reversion expectant on the term; and that there is no rent having a money value incident to the reversion (*c*). And it is provided (*d*) that the estate in fee simple acquired by enlargement shall be subject to all the same trusts, powers, executory limitations over, rights, and equities, and to all the same covenants and provisions relating to user and enjoyment, and to all the same obligations of every kind, as the term would have been subject to if it had not been enlarged.

It having been suggested that this enactment applied only where the immediate reversion on the term is an estate in fee simple, it was declared by the Conveyancing Act, 1882 (*e*), that the above enactment shall apply, and be deemed to have always applied, whether the term has, as the immediate reversion thereon, the freehold or not; but not where the term is liable to

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from all estates, interests, and rights to which the mortgage has priority, but subject to all estates, interests, and rights, which have priority to the mortgage." This section, applying to mortgages made after 1881, does not enable a mortgagee to convey a larger estate than he has; *e.g.*, an equitable mortgagee cannot convey the legal estate: *Re Hodson and Howes*, 35 Ch. Div. 668. The section also makes the exception that "in the case of copyhold or customary land, the legal right to admittance shall not pass by a deed under this section, unless the deed is sufficient otherwise by law, or is sufficient by custom in that behalf."

(*a*) W. B. & C., p. 119; see also Dart, V. & P. 335, 336.

(*b*) 44 & 45 Vict. c. 41, s. 65.

(*c*) For forms of such deeds, see Dav. Conc. Prec., pp. 599, *et seq.*; and see observations on this section, *ib.*, pp. 81, 82. It has been held that a rent of 3*s.* is not a rent having no money value within the section; *Re Smith and Stott*, 29 Ch. Div. 1009, note; but that a rent of "one silver penny, if lawfully demanded," is such a rent; *Re Chapman and Hobbs*, 29 Ch. Div. 1007.

(*d*) 44 & 45 Vict. c. 41, s. 65 (4).

(*e*) 45 & 46 Vict. c. 39, s. 11.

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be determined by re-entry for condition broken, or has been created by sub-demise out of a superior term, which itself is incapable of being enlarged into a fee simple.

Estate at sufferance.

It remains to explain the nature of an Estate at Sufferance. It arises when one having come into possession of land under a lawful title wrongfully continues in possession or "holds over," as it is called, after his title has determined. Thus, a tenant under a lease for years, holding over without leave after the expiration of the term of years, would be a tenant at sufferance; or, in case of a tenancy from year to year, and notice to quit at the end of the year duly given, if the tenant hold over, he will be in at sufferance (*f*).

Remedies for holding over.

The possession, however, having been originally rightful, the landlord, in order to maintain an action of trespass, must, said Blackstone, first declare the wrongfulness of the possession by some public and avowed act, as by entry, or legal process of ejectment, which might then be followed up by an action of trespass (*g*). Statutes, however, have from time to time been passed for the relief of landlords, some by making the tenant liable to pay double the rent, or double the yearly value of the land, as the consequence of his holding over: others in the way of summary remedy before a magistrate, and so forth. Thus by the Landlord and Tenant Act, 1730 (4 Geo. II. c. 28), it is enacted that a tenant holding over after demand of possession by the landlord shall pay "double the yearly value" of the lands; and by the Distress for Rent Act, 1737 (11 Geo. II. c. 19, s. 18), that a tenant holding over, after the expiration of a notice given by himself of his intention to quit, shall thenceforth pay "double the rent" which he would otherwise have paid (*h*).

(*f*) See other instances given in Tudor's L. C. R. P., p. 8. It is sometimes called an estate "by" sufferance. From the nature of the estate, it cannot arise by contract. It seems to have originated in a desire to prevent a title from being acquired under the Statute of Limitations by adverse possession, as to which, see *post*, Ch. XVI.

(*g*) 2 Bl. 150; Co. Litt. 57 b.

(*h*) See Tudor, L. C. R. P., p. 11; and, as to the jurisdiction of County Courts in cases where neither the value of the premises nor the rent exceeds £50, see the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 138. See further as to estates at sufferance, 1 Cruise, Dig. 249.

CHAPTER VII.

ESTATES ON CONDITION: MORTGAGES.

I. Estates on Condition.

REFERENCE was made in a former chapter (*a*) to an early doctrine of the law which, in the case of a limitation to one and the heirs of his body, treated the estate as a fee simple conditional on issue being born; also (*b*) to cases in which a forfeiture was incurred by non-compliance with an implied condition on which an estate was held, as where a tenant for life or years did some act which amounted to an assertion of a right to a greater estate than that which belonged to him.

In the main, however, the estates already considered have been of an absolute character. It remains to point out a modification of ownership which exists in the case in which an estate arises or ceases upon condition. All the different estates which have been under consideration (estates for life, estates in tail or in fee, estates of freehold or not of freehold) may be so modified, both as to their commencement and their continuance.

Where there are two events, A. and B. (and A. is of such a nature that it may or may not happen), and event B. is to happen if, and only if, event A. happens, A. is called a condition. To take a trivial example:—A mother tells her child that, if he is good, she will take him to the Zoological Gardens; and that, if it rains while they are there, she will take him away immediately. Here the event of the child's being good is a condition on the fulfilment of which he will be taken to the Gardens; the occurrence of rain is a condition on the fulfilment of which he will be taken away.

"Condition" defined.

A condition has been defined for legal purposes to be "a qualification or restriction annexed to a conveyance of lands, whereby it is provided that, in case a particular event does or does not happen, or in case the grantor or grantee does, or omits

(*a*) *Ante*, p. 64. (*b*) *Ante*, p. 39.

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to do, a particular act, an estate shall commence, be enlarged, or defeated" (*c*).

A condition may be either implied or express.

Condition implied.

An implied condition is one which is created by Common or Statute law, without any express words; it is sometimes called "a condition in law." Thus, in the case of the grant of an office, which may sometimes amount to a freehold interest, and may be limited to one even in perpetuity, there is implied in law the condition that the grantee shall duly execute the office, and that on breach of this condition, it shall cease (*d*).

Littleton says (*e*) :—

"If a man grant by his deed to another the office of parkership of a park, to have and occupy the same office for term of his life, the estate which he hath in the office is upon condition in law, to wit, that the parker shall well and lawfully keep the park, and shall do that which to such office belongeth to do, or otherwise it shall be lawful to the grantor and his heirs to oust him, and to grant it to another if he will."

So a tenant for life, or tenant for years, was held to take the estate upon an implied condition that he would not set up a pretence to an interest larger than his actual interest in the lands,—the former that he would not attempt to alienate in fee or in tail, the latter that he would not do an act in assertion of a right to the freehold. It was because the doing of such acts would be in breach of the implied condition under which the estate was held, that the obnoxious act involved a forfeiture of the estate itself (*f*).

Condition expressed.

An express condition is one in terms declared in the instrument creating the estate, or in a separate deed called a "defeasance" (*g*), and is technically termed a condition "in deed" (*h*). A condition of this nature may be "precedent" or "subsequent" (*i*).

(*c*) 2 Cruise, Dig. 2; Co. Litt. 201 a.

(*d*) See Litt. s. 325; Co. Litt. 201 a, and Butler's note (1); Shep. T. 118, 126. A man may have an estate in an office to him and his heirs, or for life, or for a term of years, or during pleasure only, *durante bene placito*, as were the Judges of the Superior Courts at Westminster until 12 & 13 Will. III. c. 2, which altered it to *quamdiu bene se gesserint*, which is for life; 3 Cruise, Dig. 99; but their commissions expired with the demise of the Crown till 1 Geo. III. c. 23. The lord of the manor may grant the office of steward of the manor for the life of the grantee; *Bartlett* v. *Downes*, 3 B. & C. 616.

(*e*) S. 378.

(*f*) 2 Bl. 153: Co. Litt. 233 b.

(*g*) As to when a defeasance must be contemporaneous with, and when it may be subsequent to, the deed creating the estate, see Shep. T. 396. As to what is a defeasance, see *Ex parte Popplewell*, 21 Ch. Div., at p. 81.

(*h*) Co. Litt. 201 a.

(*i*) Elph. Introd. 442.

Conditions:—Precedent, Subsequent.

As their names respectively denote, a "condition precedent" is one which must happen before the estate can commence; a condition "subsequent" is one by the happening of which an existing estate will be defeated (*k*). Thus there is a condition "precedent" when an estate is granted to one for life, upon condition that if the grantee pay to the grantor a certain sum of money at such a day, then he shall have the fee simple; in this case the condition precedes the estate in fee, and on performance thereof the grantee gains the fee simple. An example of a condition "subsequent" is when a man grants to another an estate in fee, but upon condition that, if the grantor shall pay to him at such a day a certain sum, his estate shall cease. A condition precedent gets and gains the thing or estate made upon condition, by the performance of it; and such a condition subsequent as above cited determines the estate by the performance of the condition (*l*).

Conditions subsequent.

Conditions subsequent must be distinguished from determinable estates, and from conditional limitations. A condition subsequent is something superadded to the limitation of the estate—for example, where an estate is limited to A. and his heirs, with a proviso that if he marry a particular woman the estate shall cease.

Who has benefit of condition.

At Common law a condition can only be taken advantage of by the person creating it, and by his heirs, as to estates descendible to them; or by his executors and administrators as to property transmissible to them; or, where a corporation sole creates the condition, by his successors (*m*). At the present day a condition contained in a lease may be enforced by the person entitled, subject to the term, to the income of the land (*n*).

(*k*) 2 Cruise, Dig. 2. But see the remarks of Mr. Preston on Shep. T. 117, where he maintains that "that clause only is a condition which is to defeat the estate after it has been created or enlarged;" in other words, that all conditions, properly so called, are *subsequent*. He says that "when a clause stays or suspends the estate, or rather the gift, and makes it uncertain whether the gift shall take effect or not, that clause is properly a limitation, and denominated sometimes a conditional limitation and sometimes a limitation on a contingency." The learned writer, however, appears to mean only that, as (in his own words) "it is the province of a limitation to mark the period or event for the commencement, and the time of continuance or duration of an estate," where an event on which an estate is to arise is specified, *i.e.*, where there is a condition *precedent*, that condition is part of the limitation, inasmuch as it marks the point from which the estate commences.

(*l*) *Termes de la Ley.* See Shep. T. 117.

(*m*) Challis, R. P. 71; Co. Litt. 214 b.

(*n*) See Elph. Introd. 240; Co. Litt. 215 a; *ante*, p. 175.

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Determinable estate.

In a determinable estate, the condition is incorporated into and forms part of the limitation—for example, a gift to A. and his heirs, "tenants of the Manor of Dale," constitutes the tenancy a condition of the existence of the estate; the moment the tenancy of the manor ceases, that moment does the estate determine, and this not by way of engrafted condition, but as part of the terms of grant: the estate as originally created is, in truth, a base (or qualified) fee, for it must be determined whenever the qualification is at an end (*o*). Another instance is a gift in trust for a man for life, until bankruptcy, or alienation of the property (*p*).

"Conditional Limitation."

A determinable estate is sometimes called a "conditional limitation," but as this phrase is also used in a different meaning, which we proceed to explain, the use of "conditional limitation" in this meaning may lead to confusion.

Mr. Preston says (*q*):—

"An absolute limitation names a day, a time, or an event, for the commencement of the estate, which will certainly happen.

"A conditional limitation, or, as it is otherwise denominated, a limitation upon condition, renders it necessary that some act should be done, or that some event, which will not certainly happen, should take place before a right to present or future enjoyment can arise.

"Contingent remainders, and estates which have their operations by resulting or springing use, or by executory devise (*r*), and which are to commence on *an event* (*s*), are all raised by conditional limitations. In short, every limitation which is to vest an interest on condition, or rather a contingency (for that is the correct phrase), in other words, an event which may or may not happen, is a conditional limitation. And whether a limitation of this sort is to give an interest to commence on and immediately after the regular and proper determination of a preceding estate, so as to fall within the description of a remainder; or independently of and in derogation, and to the exclusion of a preceding estate, it is properly denominated a conditional limitation, or a limitation on a contingency.

"In practice, those limitations which are to give an estate, to take effect in abridgment and exclusion of another estate (*t*), are more generally distinguished by this term, and those limitations which give

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(*o*) 2 Bl. 154; Co. Litt. 27 a; Challis, R. P. 225. As to determinable fees, see 3 L. Q. R. 399, and Challis, R. P., Appendix iv., p. 398.

(*p*) See *Re Brewer*, [1896] 2 Ch. 507; 2 K. & E. 428, 544, and Addenda thereto; and *ante*, p. 115.

(*q*) Preston on Estates, p. 40.

(*r*) As to these remainders and estates, see *post*, Ch. VIII. and Ch. X.

(*s*) *I.e.*, an *uncertain* event.

(*t*) In this case one estate is made to determine, and the other to arise on the performance of the same express condition: the condition is subsequent to the former and precedent to the latter estate.

contingent remainders, are distinguished by the appellation of limitations upon contingency."

Limitations and conditions distinguished.

The distinction between a condition and a limitation has been thus expressed:—

"A limitation marks the utmost time of continuance; a condition marks some event, which, if it happens in the course of that time, is to defeat the estate. Thus, A. gives land to B. for twenty years. In this case the estate may endure to the end of that period, so that it may be fully completed. The space of twenty years is the period for which the estate is to continue; and the words, appointing this to be the time of continuance are called the limitation, from their ascertaining the boundary of the estate. But if a clause introduced by, and concluding in words of condition, is added, that if somewhat shall be done, or omitted by either of the parties, or by any other person in the meantime, that then the term of twenty years shall cease and be void, this is a clause of condition; and on the rise of the event on which the term is to cease, or be avoided, and a pursuit of title by entry or claim, the condition will put an end to the estate of the person to whom the limitation is made, and of all persons claiming under him, though the period to which it was extended in its limitation, is not yet arrived" (*u*).

In conveyances operating at Common law, a subsequent estate limited on a condition which is to defeat a preceding estate is void; but it is otherwise as to conveyances by way of use (*x*); and as to wills, Mr. Fearne says:—

"It seems now agreed, that wherever in a devise a condition is annexed to a preceding estate, and upon the breach or non-performance the estate is devised over to another, that condition shall operate as a limitation, circumscribing the continuance and measure of the first estate: and that upon the breach or non-performance of it (as the case may be), the first estate shall *ipso facto* determine and expire, without entry or claim; and the limitation over shall thereupon actually commence in possession, and the person claiming under it, whether heir or stranger, shall have immediate right to the estate. Thus, indeed, is the testator's intention effectuated, by substantiating the subsequent estate, though limited to a stranger; and enforcing the performance of the condition, by the determination of the preceding estate upon the breach of it; notwithstanding that preceding estate be limited to the heir himself. And limitations of this sort are properly called conditional limitations" (*y*).

(*u*) Preston on Estates, 46. See *Re Moore*, 39 Ch. Div. 116, and Challis, R. P. 233, where it is pointed out that where a fee simple is determinable by the form of the limitation (*e.g.*, to A. and his heirs until B. returns from Rome), the estate determines *ipso facto* by the happening of the event: but where there is a condition, external to the limitation, the estate is not determined until entry by the person entitled to take advantage of the condition. See 2 Cruise, Dig. 37, s. 64.

(*x*) Fearne, C. R. 274.

(*y*) Fearne, C. R. 272, 381 (note).

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The distinction between conditions and limitations is perhaps somewhat refined, but it has certain practical results. Thus, in the case of a condition, where the estate subject to it amounts to a freehold, the law leaves it to the party entitled to the benefit of the condition to take some active step towards its enforcement, and consequently requires him to make an entry on the lands before it treats the estate as determined (*z*). An actual entry is not now necessary; bringing an action of ejectment (now an action to recover possession) would serve the same purpose. For, as Wilde, C.J., said (*a*):—

"It has become common learning that an actual entry is only now necessary in one case, and that is, to avoid a fine with proclamations; and the only ground upon which it is held to be necessary in that case is the supposed stringency of the express words of the Statute of Fines, 4 Hen. VII. c. 24" (*b*).

Accordingly Blackstone says (*c*):—

"When an estate is, strictly speaking, upon condition in deed (as if granted expressly upon condition to be void upon the payment of £40 by the grantor, or so that the grantee continues unmarried, or provided he goes to York, &c.), the law permits it to endure beyond the time when such contingency happens, unless the grantor or his heirs or assigns take advantage of the breach of the condition, and make either an entry or a claim, in order to avoid the estate."

It is, otherwise, however, when the estate is not one of freehold. Thus, if a lease for years be made on condition that, if the lessee goes not to Rome before such a day, the lease shall be void, the lease is *ipso facto* void upon the breach of the condition without any entry by the lessor, but if the lease had been for life, an entry would have been necessary before it could have been defeated (*d*).

In the case of a determinable estate, the estate terminates *ipso facto* by the happening of the specified event. Thus Blackstone says (*e*):—

"When land is granted to a man, so long as he is parson of Dale, or while he continues unmarried, or until out of the rents and profits he

(*z*) Litt. S. 351; Shep. T. 121; *ib.* 150; 2 Cruise, Dig. 37, s. 64.

(*a*) In *Doe* v. *Rollings*, 4 C. B. 196.

(*b*) This was said in 1847. Fines were abolished by 3 & 4 Will. IV. c. 74. See *ante*, p. 71.

(*c*) Vol. ii. 155.

(*d*) "For a lease for years may begin without ceremony, and so end without ceremony;" Co. Litt. 214 b; see Shep. T. 151; 2 Cruise, Dig. 32, s. 39; *ib.* 33, s. 45.

(*e*) Vol. ii. 155.

shall have made £500 and the like, the estate determines as soon as the contingency happens (when he ceases to be a parson, marries a wife, or has received the £500), and the next subsequent estate, which depends upon such determination, becomes immediately vested, without any act to be done by him who is next in expectancy."

Stranger taking benefit of condition.

So again at Common law, as we have pointed out above, it was not open to a stranger to take advantage of an express condition subsequent, or to enter for its breach. The benefit of the condition was reserved to the grantor or his heirs; and the right of entry could not be assigned. Thus, to take the common case of the grant of a lease, with a proviso for re-entry on non-payment of rent; there, if the grantor assigned over his reversionary estate to another, that other could not avail himself of the condition. On the other hand, in the case of a determinable estate, any person, whether stranger or not, might be entitled to enter upon its termination, the estate itself ceasing to exist. Thus, if a man make a lease until A. shall return from Rome, and afterwards grant the reversion over to another, such grantee, on the return of A. from Rome, is entitled to enter, the interest of the lessee being then determined by the terms of the limitation itself (*f*).

The incapacity, however, of strangers to take the benefit of these conditions was a doctrine only of the Common law; and, as regards the grantees of reversions upon leases for life or years, was, as we have seen, remedied by statute so far back as the reign of Henry VIII. (*g*)

Rights of entry now alienable.

Now, under the Real Property Act, 1845 (*h*), "a right of entry, whether immediate or future, and whether vested or contingent, into or upon any tenements or hereditaments in England of any tenure, may be disposed of by deed." It has been held, however, in *Hunt* v. *Bishop* (*i*), that this does not apply to the case of a condition in a lease broken before alienation of the reversion. In that case, Pollock, C.B., said:—

"We think that the 8 & 9 Vict. c. 106, does not relate to a right to re-possess or re-enter for a condition broken, but only to an original right where there has been a disseisin, or where the party has a right to recover lands, and his right of entry and nothing but that remains."

(*f*) Co. Litt. 214 b.
(*g*) 32 Hen. VIII. c. 34; *ante*, p. 170.
(*h*) 8 & 9 Vict. c. 106, s. 6.
(*i*) 8 Ex. 675; and see *Hunt* v. *Remnant*, 9 Ex. 635, and *per* Maule, J., at p. 640.

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And Maule, J., said:—

"It does not mean a right of entry for a forfeiture, but a right of entry in the nature of an estate or interest, that is, where a person by lapse of time has lost everything except his right of entry."

Jessel, M.R., observed that:—

"The reason why a right of entry for condition broken was not assignable by virtue of 8 & 9 Vict. c. 106, s. 6, may be taken to be that it was at the election of the person entitled to enter whether he would take advantage of the breach of the condition" (*j*).

By the Conveyancing and Law of Property Act, 1881 (*k*), it is enacted in regard to leases made since 1881, that every condition of re-entry and other condition therein contained, shall be annexed and shall be incident to and shall go with the reversionary estate immediately expectant on the term: and shall be capable of being enforced and taken advantage of by the person entitled, subject to the term, to the income of the land leased.

By the Wills Act, 1837 (*l*), all rights of entry for conditions broken and other rights of entry may be disposed of by will.

Conditions:—Impossible, Illegal, Repugnant.

No condition can operate by way of defeasance of an estate, if it be either impossible, or contrary to law, or repugnant to the estate itself (*m*).

In the case of a condition precedent being or becoming impossible to be performed, the estate will not arise (*n*); but in the case of an impossible condition subsequent, the estate will be or become absolute; so also if the condition be illegal; and conditions which are repugnant to the estate are absolutely void (*o*).

The following examples are given by Blackstone (*p*):—

"If a feoffment be made to a man in fee simple, on condition that, unless he goes to Rome in twenty-four hours, or unless he marries with Jane S. by such a day (within which time the woman dies, or the feoffor marries her himself), or unless he kills another, or in case he aliens in fee, then, and in any of such cases, the estate shall be vacated and determined; here the condition is void, and the estate made absolute in the feoffee. For he hath by the grant the estate vested in him, which shall not be defeated afterwards by a condition either impossible, illegal, or repugnant. But if the condition be precedent, or to be performed before the estate vests, as a grant to a man that, if he kills another or goes to Rome in a day, he shall have an estate in fee; here,

(*j*) *Jenkins* v. *Jones*, 9 Q. B. D. 131.
(*k*) 44 & 45 Vict. c. 41, s. 10.
(*l*) 7 Will. IV. & 1 Vict. c. 26, s. 3.
(*m*) 2 Cruise, Dig. 4; Co. Litt. 206 b.
(*n*) Co. Litt. 206 b; *Walker* v. *Walker*, 2 De G. F. & J. 255.
(*o*) 2 Bl. 156; Co. Litt. 206 b. See notes to *Bradley* v. *Peixoto*, in Tudor, L. C. R. P.
(*p*) Vol. ii. 157.

the void condition being precedent, the estate which depends thereon is also void, and the grantee shall take nothing by the grant: for he hath no estate until the condition be performed."

Conditions in restraint of marriage.

Another instance of illegality is a devise subject to a condition in general restraint of marriage; there a limitation over is of no effect (*q*). But not so where the object of the testator is not to restrain marriage, but to provide for a person while unmarried; as, where a gift to a woman for her life was subject to a proviso that she should "remain in her present state of single woman," but if she should marry, then the property should go over to another, it was held there was nothing illegal in the proviso, and on her marriage her estate ceased (*r*).

Conditions in restraint of alienation.

The above instances sufficiently illustrate the avoidance of a condition by its impossibility or illegality; but the case of avoidance by repugnancy may require more explanation. Where an estate is granted to one, whether for life, in fee, or for years, the legal result of such a grant is that the grantee shall have the power of dealing with the property to the extent of his interest in it, and consequently, whatever that interest may be, of alienating it. To annex to such a grant a condition that the grantee shall not alienate, would be at variance with, in other words repugnant to, the very grant itself; such a condition, accordingly, the law holds to be void (*s*). This must not be confused with a limitation of an estate to a man for his life, or *until* he shall become bankrupt or charge it; for there the limitation itself is for an interest possibly less than a life estate, and is different from a limitation in the first instance for life, followed by a proviso that the grantee shall not sell or alien it, where the proviso is repugnant to the estate limited (*t*). But a limitation to A. until his bankruptcy is not allowed to have effect so as to determine his interest on bankruptcy, if the estate belonged to the bankrupt

(*q*) Elph. Introd. 444.

(*r*) *Jones* v. *Jones*, 1 Q. B. D. 279.

(*s*) See the subject discussed in *Rochford* v. *Hackman*, 9 Hare, 475; *Re Machu*, 21 Ch. Div. 838; *Re Rosher*, 26 Ch. Div. 801; *Re Dugdale*, 38 Ch. Div. 176; and *Corbett* v. *Corbett*, 14 P. D. 7.

(*t*) *Brandon* v. *Robinson*, 18 Ves. 433, *per* Lord Eldon; *ante*, p. 115; Elph. Introd. 333; 2 Vaizey on Settlements, 947, *et seq.* In some cases of a gift to A. for life, with remainder to B., followed by a proviso on condition that, if A. should attempt to alienate, his life estate shall cease, the instrument has been construed as giving to A. an estate for life *or until* he should attempt to assign, and upon that event or after his death, over, and such a limitation is held valid: see *e.g.*, *Joel* v. *Mills*, 3 K. & J. 458.

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originally and was settled by him (*u*). The provision that a married woman shall not dispose, by way of anticipation, of the income of property settled to her separate use, may appear to be a repugnant condition; but it is not so, for, separate use being the creature of equity, equity may limit her power in aliening property which without equity she would have no power to alien (*x*).

Mortgages.

II. Mortgages what—at law.

A mortgage of land is a conveyance of the land by a borrower (the mortgagor) to a lender (the mortgagee) by way of security for the repayment of the loan. The mortgage deed in practice always includes also personal covenants by the mortgagor for repayment of the principal money and interest thereon; and, in the absence of an express covenant, the mortgagor would be personally liable, but only as for a simple contract debt (*y*).

The ancient form of a mortgage was a conveyance of the estate followed by a proviso or condition making the conveyance voidable by re-entry on payment of the mortgage debt and interest at a given day. Hence the origin of the term "mortgage" is thus given by Littleton:—

Origin.

> "If a feoffment be made upon such condition, that if the feoffor pay to the feoffee at a certain day, &c., £40 of money, that then the feoffor may re-enter, &c., in this case the feoffee is called tenant in *morgage*, which is as much to say, in French, as *mortgage*, and in Latin, *mortuum vadium*. And it seemeth that the cause why it is called mortgage is, for that it is doubtful whether the feoffor will pay at the day limited such sum or not; and if he doth not pay, then the land which is put in pledge upon condition for the payment of the money, is taken from him for ever, and so dead to him upon condition, &c. And if he doth pay the money, then the pledge is dead as to the tenant, &c." (*z*)

A mortgage in the above form affords an instance of the use of a condition subsequent to defeat an estate (*a*).

(*u*) *In re Pearson*, 3 Ch. Div. 807. See above, p. 115, where this subject is more fully explained.

(*x*) *Brandon* v. *Robinson*, 18 Ves. 435, *per* Cotton, L.J., in *Corbett* v. *Corbett*, 14 P. D., at p. 11; *ante*, p. 116, note (*e*).

(*y*) *Per* Lord Thurlow, C., *Ancaster* v. *Mayer*, 1 Bro. C. C. 454, at p. 464; S. C. 1 W. & T. Where there is no covenant to pay interest after the day named for repayment of the principal, the mortgagee may recover damages limited to £5 per cent. in lieu of subsequent interest; *Re Roberts*, 14 Ch. Div. 49; see *Mellersh* v. *Brown*, 45 Ch. Div. 225.

(*z*) Litt. S. 332. By "tenant" here is meant the mortgagee, who holds the legal estate. See, however, as to the origin of the term *mortgage*, Wms. R. P. 509; P. & M. Hist. ii. 118.

(*a*) See Elph. Introd. 139; 2 Cruise, Dig. Tit. xv., p. 65; 1 Spence, 153; *ib.*, 601; 2 Spence, 614.

But, says Mr. Davidson (*b*):—

"This form was extremely objectionable, on account of the strictness with which conditions are construed, and of the difficulty of preserving evidence of the payment of the mortgage money on the exact day appointed. The money was seldom paid on the day appointed, and it became the practice to procure a reconveyance from the mortgagee on all occasions, so as to render it certain that the legal estate had again vested in the mortgagor."

Legal right of redemption.

The modern form of a mortgage of freeholds (*d*) is an absolute conveyance of lands by the mortgagor to the mortgagee, subject to an agreement (called the "proviso for redemption") that, if the mortgagor repay the sum lent with interest on a day named, the mortgagee will reconvey the premises. The estate in fee simple thus passes to the mortgagee, but subject to the proviso that he will reconvey upon payment on the day named; and the payment does not of itself, without reconveyance, put an end to the estate vested in the mortgagee. So entirely does the legal estate pass to the mortgagee that the period within which the mortgagee may bring his action to recover the premises mortgaged will, if no interest is paid, and no acknowledgment of his title is made by the mortgagor, be calculated from the date of the execution of the mortgage deed (*e*). Again, in the case of any mortgage made before 1882, the mortgagor cannot, in the absence of express provision contained in the mortgage, or an agreement in writing after 1881, between the mortgagor and mortgagee (*f*), grant a lease without the concurrence of the mortgagee (*g*); and, in such a lease, the covenants by the lessee must be entered into with the mortgagee so that they may run with the land (*h*). It is, however, provided by the Judicature Act, 1873 (*i*), that:—

Leases by mortgagor.

S. 25 (5). "A mortgagor, entitled for the time being to the possession or receipt of the rents and profits of any land, as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person."

(*b*) 2 Dav. Prec., Part II., 31.
(*d*) 2 K. & E. 68; Stud. Prec. 52.
(*e*) *Doe* v. *Lightfoot*, 8 M. & W. 553.
(*f*) Conv. and Law of Prop. Act, 1881, s. 18 (16), *post*, p. 198. See Elph. Introd. 156.
(*g*) See *per* Lord Selborne, L.C., in *Corbett* v. *Plowden*, 25 Ch. Div., at p. 681.
(*h*) See 1 Dav. Prec. 116.
(*i*) 36 & 37 Vict. c. 66, s. 25 (5); see *Yorkshire Banking Co.* v. *Mullan*, 35 Ch. Div. 125.

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Power of leasing under Conveyancing Act, 1881.

Now, in the case of a mortgage made after the 31st December, 1881, by the Conveyancing and Law of Property Act, 1881 (*k*), power is given to the person *in possession*, whether mortgagor or mortgagee, to make or agree to make (*l*) an agricultural or occupation lease for any term not exceeding twenty-one years, and a building lease for any term not exceeding ninety-nine years. The rent and benefit of the lessee's covenants and the obligation of the lessor's covenants will be annexed to and go with the reversionary estate in the land immediately expectant on the term (*m*). For the protection of the mortgagee in the case of a lease by the mortgagor, the latter is to deliver to him within one month after making the lease a counterpart of the lease duly executed by the lessee (*n*). But such power is given only if and as far as a contrary intention is not expressed in the mortgage deed, or otherwise in writing: and the mortgage deed may reserve to or confer on the mortgagor or the mortgagee, or both, further or other powers of leasing (*o*).

The same provisions or any of them may be applied to a mortgage made before January 1st, 1882, by agreement in writing made after 31st December, 1881, between mortgagor and mortgagee (*p*).

Possession.

Strictly speaking, the mortgagee has (subject of course to any subsisting tenancies created by the mortgagor before the mortgage) a right to the possession, as a consequence of the conveyance to him of the estate; but from the nature of the transaction it is seldom desired by the parties that the mortgagee should take possession, and in practice the mortgagor remains in possession.

"The possession of the mortgaged land by the mortgagor, during the subsistence of the security, and while the mortgagee did not choose to take possession, was held (at law as well as in equity) to be 'at the will,' or by the 'sufferance' or 'permission' of the mortgagee, under a 'tacit agreement,' which the mortgagee might determine at his pleasure. It was of the nature of the transaction that the mortgagor should continue in possession. His possession was rightful and not by wrong. He was entitled to the rents and profits as long as he remained in

(*k*) 44 & 45 Vict. c. 41, s. 18.

(*l*) *Ib.*, s. 18, sub-ss. (12) and (17).

(*m*) 45 & 46 Vict. c. 41, ss. 10—11. As to leases under s. 18, see *Municipal, &c., Building Society* v. *Smith*, 22 Q. B. D. 70.

(*n*) S. 18, sub-ss. 11, 17.

(*o*) S. 18, sub-ss. 13, 14. As to the detrimental effect on the mortgagee of excluding the mortgagor's power of leasing, see W. B. & C., p. 65, and 2 K. & E., p. 46.

(*p*) S. 18, sub-s. 16.

possession; mesne profits accrued due and received prior to action or demand could not be recovered from him by the mortgagee" (*q*).

The right of retaining possession till the day named for payment was till lately expressly reserved to the mortgagor, the stipulation that he shall remain in possession operating as a re-demise (*r*); but, if the day named for payment pass without payment, the mortgagee may enter or bring an action for possession, even against a tenant (if the mortgage is made before 1882) without giving notice to quit, if such tenant claim under a lease from the mortgagor granted after the mortgage without the privity of the mortgagee (*s*).

The doctrine was clearly enunciated (*t*) by Lord Mansfield as follows:—

"This is an ejectment, brought for a warehouse in the City, by a mortgagee, against a lessee under a lease in writing for seven years, made after the date of the mortgage, by the mortgagor, who had continued in possession. The lease was at a rack-rent. The mortgagee had no notice of the lease, nor the lessee any notice of the mortgage. The defendant offered to attorn to the mortgagee before the ejectment was brought. The plaintiff is willing to suffer the defendant to redeem. There was no notice to quit: so that, though the written lease should be bad, if the lessee is to be considered as tenant from year to year, the plaintiff must fail in this action. The question, therefore, for the Court to decide is, whether by the agreement understood between mortgagors and mortgagees, which is, that the latter shall receive interest, and the former keep possession, the mortgagee has given an implied authority to the mortgagor to let from year to year at a rack-rent; or whether he may not treat the defendant as a trespasser, disseisor, and wrongdoer. No case has been cited where this question has been agitated, much less decided. The only case at all like the present, is one that was tried before me on the Home Circuit; but there the mortgagee was privy to the lease, and afterwards by a knavish trick wanted to turn the tenant out. I do not wonder that such a case has not occurred before. Where the lease is not a beneficial lease (*u*), it is for the interest of the mortgagee to

(*q*) *Per* Lord Selborne, C., in *Heath* v. *Pugh*, 6 Q. B. D., at p. 359. See as to the right of the mortgagor in possession to rents and profits, *Higgins* v. *York Buildings Co.*, 2 Atk. 107; *Drummond* v. *St. Albans*, 5 Ves. 438; *Earl of Clarendon* v. *Barham*, 1 Y. & C. C. C. 688; and the mortgagee has no right to growing crops unless he takes possession, *Ex parte Temple*, 1 G. & J. 216; see 2 Spence, 646, and 657, note (1). See as to the right of an occupier to compensation in respect of crops from a mortgagee taking possession, the Tenants Compensation Act, 1890 (53 & 54 Vict. c. 57), s. 2.

(*r*) Notes to *Keech* v. *Hall*, 1 Sm. L. C.

(*s*) *Keech* v. *Hall*, 1 Dougl. 21; S. C. 1 Sm. L. C.

(*t*) In *Keech* v. *Hall*, *ubi sup.*

(*u*) *I.e.*, a lease for the grant of which the lessor receives a premium or lump sum, so that the rent reserved is less than a rack-rent. A lease may also become beneficial owing to a rise in the value of the thing demised during the term granted by the lease.

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continue the tenant; and where it is, the tenant may put himself in the place of the mortgagor, and either redeem himself (*x*), or get a friend to do it. The idea that the question may be more proper for a Court of Equity goes upon a mistake. It emphatically belongs to a Court of Law, in opposition to a Court of Equity; for a lessee at a rack-rent is a purchaser for a valuable consideration, and in every case between purchasers for a valuable consideration, a Court of Equity must follow, not lead the law. On full consideration, we are all clearly of opinion, that there is no inference of fraud or consent against the mortgagee, to prevent him from considering the lessee as a wrongdoer. It is rightfully admitted that if the mortgagee had encouraged the tenant to lay out money, he could not maintain this action; but here the question turns upon the agreement between the mortgagor and the mortgagee: when the mortgagor is left in possession, the true inference to be drawn is an agreement that he shall possess the premises at will in the strictest sense, and therefore no notice is ever given him to quit, and he is not even entitled to reap the crop, as other tenants at will are, because all is liable to the debt (*y*); on payment of which the mortgagee's title ceases. The mortgagor has no power, express or implied, to let leases not subject to every circumstance of the mortgage. If, by implication, the mortgagor had such a power, it must go, to a great extent, to leases where a fine is taken on a renewal for lives. The tenant stands exactly in the situation of the mortgagor. The possession of the mortgagor cannot be considered as holding out a false appearance. It does not induce a belief that there is no mortgage: for it is the nature of the transaction that the mortgagor shall continue in possession."

But though an agreement, to be collected from the mortgage deed, that the mortgagor shall remain in possession for a time certain, operates as a re-demise, an agreement that the mortgagee may enter upon, or the mortgagor hold until, a default, the time of which is uncertain, cannot operate as a re-demise for want of certainty (*z*). In modern practice, therefore, to prevent any question whether there has been a re-demise to the mortgagor, it is usual not to insert any proviso or covenant for quiet enjoyment by the mortgagor till default (*a*); but the covenant for quiet enjoyment by the mortgagee is made to commence in operation after default. This does not postpone the mortgagee's right of entry (even without the notice or demand (*b*), which would be necessary where the relationship of landlord and tenant has been

(*x*) See *Tarn* v. *Turner*, 39 Ch. Div. 456.

(*y*) But a mortgagee is not entitled to make the mortgagor account for back rents or profits during the mortgagor's possession; *Yorkshire Banking Co.* v. *Mullan*, 35 Ch. Div. 127.

(*z*) Notes to *Keech* v. *Hall*, 1 Sm. L. C. See *ante*, p. 160.

(*a*) See 2 Dav. Prec., Part II., p. 450.

(*b*) *Doe* d. *Garrod* v. *Olley*, 12 A. & E. 481; *Doe* d. *Snell* v. *Tom*, 4 Q. B. 615.

created), or disable him from bringing his action for possession at once (*c*). The same form of covenant is implied under the Conveyancing and Law of Property Act, 1881 (*d*).

Such is a mortgage at Common law, under which the mortgagor has no legal right to redeem except upon payment at the day named in the proviso for redemption, and which regarded the estate, after default made by the mortgagor in payment at that day, as belonging to the mortgagee absolutely.

Equitable right of redemption.

A right to redeem after the appointed day appears to have been allowed in equity, where the default arose through accident, or the default or practice of the mortgagee, and possibly in some other cases, as from the time of Edward IV., but the equitable right of redemption in all cases after the appointed day was not established till some time in the reign of James I. (*e*), since which time equity has regarded the mortgagee as having only a security for the money lent, which forms part of his personal estate, and on his death now devolves on his executors or administrators, for whom the devisee or heir was but a trustee of the bare legal estate in the land which was the security (*f*). It is, therefore, the duty of the mortgagee to reconvey the legal estate to the owner of the equity of redemption on being repaid all moneys due for principal, interest, and costs (*g*).

Equity of redemption.

The principle upon which equity interfered to mitigate the rigour of the Common law in its treatment of mortgage transactions was that the property mortgaged is but a security for the repayment of money lent; and therefore it was established that in equity a reconveyance of the estate will be decreed, on payment of the principal, interest, and costs even after the day named for payment has gone by; and notwithstanding that the mortgagee may have entered into possession. The right of the mortgagor to this relief is called his "equity of redemption" as distinguished from the *legal* right to redeem given by the proviso for redemption on payment at the day named (*h*). The right

(*c*) *Doe* v. *Lightfoot*, 8 M. & W. 553; and 2 Dav. Prec., Part II., p. 111, and see form, *ib.*, 314.

(*d*) 44 & 45 Vict. c. 41, s. 7 (1) (C).

(*e*) Kerly, Historical Sketch, 88, 143; 1 Spence, 602.

(*f*) As to the devolution of the mortgage estate, see *post*, p. 210.

(*g*) See *Walker* v. *Jones*, L. R. 1 P. C., at p. 61; 32 Sol. J., at 717. As to the right of the mortgagor to have the mortgaged property conveyed to a stranger, see Conv. and Law of Prop. Act, 1881, s. 15 (1), *post*, p. 211.

(*h*) As to the *legal* right to redeem, see *Chesworth* v. *Hunt*, 5 C. P. D., at p. 271

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was, however, limited by the rule of the Court of Chancery that it must be exercised within a reasonable time: and therefore the mortgagee was allowed to apply to the Court to enforce the security by "foreclosure," *i.e.*, by a decree that, unless the mortgagor redeem within a given time, his equity of redemption shall be barred and extinguished (*i*). The mortgagor can enforce his equity of redemption, by bringing against the mortgagee an action to redeem; and if the mortgagee brings an action of foreclosure, the judgment allows a time (usually six months) within which the mortgagor may redeem (*k*).

Enforcement of equity.

Limitation of time for redemption, where mortgagee in possession.

In cases in which the mortgagee has taken possession, the Real Property Limitation Act, 1833 (*l*), restricted the exercise of the right of redemption to a period of *twenty* years next after the time at which the mortgagee should have taken possession, unless in the meantime there should have been an acknowledgment in writing by the mortgagee of the title of the mortgagor or of his right of redemption, in which case the time for redemption was to run from the date of acknowledgment; and by the substituted provision in the Real Property Limitation Act, 1874 (*m*), which came into operation on 1st January, 1879, the mortgagor is to be barred at the end of *twelve* years from the date of the mortgagee obtaining possession, or acknowledging in writing the title of the mortgagor or his right to redemption.

Limitation of mortgagee's

On the other hand, as to mortgagees who have not taken possession, doubts having arisen as to the effect of the first-

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and *post*, p. 224. "It may be worth remarking how great an interval in the progress of jurisprudence is marked at one extremity by the term 'mortgage' applied according to Littleton's etymology; and at the other extremity, by the rule 'once a mortgage always a mortgage,' by which in spite of the terms and primary import of the contract, it is, in the view of the law, necessarily and unalterably a pledge, unless and until, by judicial process, or by the operation of the Statutes of Limitation, the character of creditor is exchanged for that of owner," 2 Dav. Prec., Part II., p. 7. As to fettering redemption, see *Northampton (Marquess of)* v. *Pollock*, 45 Ch. Div. 190; S. C., *Salt* v. *Marquess of Northampton*, [1892] A. C. 1, and other cases referred to, 2 K. & E. 168. See further, as to the nature of an equity of redemption, 2 Cruise, Dig., 92, *et seq.*; 1 Spence, 601; 2 *ib.*, 616 and 642; *Casborne* v. *Scarfe*, 2 W. & T.; *per* Wigram, V.-C., in *Downe* v. *Morris*, 3 Hare, at p. 404; *per* Lord Selborne, C., in *Heath* v. *Pugh*, 6 Q. B. D. 345, at p. 360. As to the history of the interference of equity, see Kerly on the Equitable Jurisdiction of the Court of Chancery, 143.

(*i*) *Campbell* v. *Holyland*, 7 Ch. Div. 166, 171, *per* Jessel, M.R. As to foreclosure, see *post*, p. 203.

(*k*) For forms of judgment in redemption actions, see Seton, vol. ii., 1580.

(*l*) 3 & 4 Will. IV. c. 27, s. 28.

(*m*) 37 & 38 Vict. c. 57, s. 7. See Wms. R. P. 525.

mentioned Act (*n*), the Real Property Limitation Act, 1837 (*o*), was passed, giving to the mortgagee the right to make an entry, or bring an action or suit to recover the land at any time within twenty years next after the last payment of any part of the principal or interest, although more than twenty years have elapsed since the right to make the entry, or to bring action or suit, first accrued. By the Real Property Limitation Act, 1874 (*p*), this amending Act is to be read as if the period of *twelve* years had been therein mentioned, instead of the period of twenty years.

right to recover possession of land mortgaged.

By the same Act (*q*) it is enacted that no action, or suit, or other proceeding, shall be brought to recover any sum of money secured by any mortgage, &c., but within *twelve* years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action, or suit, or proceeding, shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments if more than one, was given.

Limitation of time to recover mortgage money.

If the mortgagor after the day named for repayment of the loan has passed, wishes to pay it off, the mortgagee is, in general, entitled to six months' notice in writing, or six months' interest in lieu of notice (*r*).

Notice before repayment.

At any time after the day of payment appointed in the proviso

Foreclosure.

(*n*) See *Doe* d. *Jones* v. *Williams*, 5 Ad. & E. 291.

(*o*) 7 Will. IV. & 1 Vict. c. 28.

(*p*) 37 & 38 Vict. c. 57, s. 9.

(*q*) 37 & 38 Vict. c. 57, s. 8. This applies also to the personal remedy on a covenant or bond to pay the money; *Sutton* v. *Sutton*, 22 Ch. Div. 511; *Fearnside* v. *Flint*, *ib.*, 579; *Re Frisby*, 43 Ch. Div. 106. See also *Kibble* v. *Fairthorne*, [1895] 1 Ch. 219; Wms. R. P. 526.

(*r*) 2 Dav. Prec., ii., 34, 35; *Smith* v. *Smith*, [1891] 3 Ch. 550; but where the mortgage is only temporary, as where it is by deposit merely, the rule does not apply, though even there the mortgagee is entitled to reasonable notice; *Fitzgerald's Trustee* v. *Mellersh*, [1892] 1 Ch. 385. But if he take proceedings to enforce payment, he is entitled to interest only to the date of payment: *Re Alcock*, 23 Ch. Div. 372; *Smith* v. *Smith*, *ubi sup.*; and this applies where the mortgagee has taken possession; *Bovill* v. *Endle*, [1896] 1 Ch. 648. If the mortgagor fails to pay at the expiration of six months' notice, the mortgagee is entitled to a further six months'

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for redemption, the mortgagee may bring his action for foreclosure of the equity of redemption in the mortgaged premises against the mortgagor or his successor in title, as owner of the estate subject to the mortgage (*s*). The defendant is allowed a time to redeem, generally six calendar months from the date of the certificate of the Master (formerly the Chief Clerk) as to the amount due for principal, interest, and costs; and, if such time be not enlarged, the mortgagee is then entitled to an order for foreclosure absolute (*t*). And where the mortgagor brings his action against the mortgagee for redemption, the dismissal of such action by reason of the money not being paid at the appointed time is equivalent to an order absolute for foreclosure (*u*).

Sale —under order of Court;

By the Chancery Procedure Act, 1852 (*x*), the Court was empowered in any suit for the foreclosure of the equity of redemption in any mortgaged property, to direct a sale instead of foreclosure on such terms as it might think fit. The operation of this section was limited, and it has been repealed by the Conveyancing and Law of Property Act, 1881 (*y*), and thereby the relief by sale is given not only to the mortgagee, but also to any person entitled to redeem. It provides that such person may have a judgment or order for sale instead of for redemption in an action brought by him for redemption alone or for sale alone, or for sale or redemption in the alternative (*z*). And it empowers the High Court in any action whatever for foreclosure, or for redemption, or for sale, or for the raising and payment in any manner of mortgage money, if it thinks fit, to direct a sale of the property on such terms as it thinks fit, and without allowing any time for redemption or payment (*a*). This power may be exercised by the Court at any time before foreclosure absolute (*b*). And the Court is empowered in an action brought by a person

notice: Wms. R. P. 525. See 2 K. & E. 253. As to notices by the second to the first mortgagee, see 2 K. & E. 81, 84, 254.

(*s*) See form of claim in Appendix C., s. ii., No. 5, Rules of Supreme Court, 1883, and Order LV., r. 5, 5 a. County Courts have jurisdiction in foreclosure or redemption where the mortgage does not exceed £500; County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 67.

(*t*) As to form of judgment in foreclosure actions, see Seton, vol. ii., p. 1575; and orders for final foreclosure absolute in Seton, vol. ii., p. 1651; *Hunter* v. *Myatt*, 28 Ch. Div. 181; *Withall* v. *Nixon*, *ib.*, 413; and *Dobie* v. *Manley*, *ib.*, 664. As to opening foreclosure, see *post*, p. 209.

(*u*) 2 Dav. Prec., Part II., 36.

(*x*) 15 & 16 Vict. c. 86, s. 48.

(*y*) 44 & 45 Vict. c. 41, s. 25, sub-s. 6.

(*z*) S. 25, sub-s. 1.

(*a*) S. 25, sub-s. 2.

(*b*) See *Union Bank of London* v. *Ingram*, 20 Ch. Div. 463.

interested in the right of redemption and seeking a sale, to direct the plaintiff to give security for costs, and may give the conduct of the sale to any defendant (*c*). In the case of bankruptcy of the mortgagor, the mortgagee may apply to the Bankruptcy Court for sale of the mortgaged property, and the Court may order a sale accordingly (*d*).

—under mortgage deed, or statutory power.

It was the practice to insert in mortgages made before 1882 a power of sale (*e*) by the mortgagee to arise after default in payment of the debt, whereby he was enabled, without reference to the mortgagor or to the Court, to sell the property and repay himself out of the proceeds (*f*). By Lord Cranworth's Act (*g*), a power of sale, with its subsidiary powers, was made incident to mortgages: but, as in some respects, the power given by the Act was less beneficial to the mortgagee than the express power usually inserted in a mortgage deed, it was the practice to insert a power of sale in the deed, and thereby to vary the powers conferred by the Act, without negativing the operation of the Act altogether (*h*).

Now, by the Conveyancing and Law of Property Act, 1881 (*i*), the above enactment has been repealed; but such repeal is not to affect any operation, effect, or consequence of any instrument executed before the 1st January, 1882. And by the same Act, it is provided (*k*) that a mortgagee (*l*) where the mortgage is made by deed executed after 31st December, 1881, if and so far as a contrary intention is not expressed in the deed, shall have "a power when the mortgage money has become due to sell or to concur with any other person in selling the mortgaged property," but that a mortgagee shall not exercise such power of sale (*m*) unless and until:

(*c*) 44 & 45 Vict. c. 41, s. 25, § 3. See *Woolley* v. *Colman*, 21 Ch. Div. 169; and *Weston* v. *Davidson*, W. N. (1882), p. 28.

(*d*) Bankruptcy Rules, 1886, rules 73—77. See *In re Jordan*, 13 Q. B. D. 228.

(*e*) See this explained in Elph. Introd. 159.

(*f*) For forms, see 2 K. & E. 20; Stud. Prec. 54; as to the duty of a mortgagee exercising the power, see *Kennedy* v. *De Trafford*, [1897] A. C. 180.

(*g*) 23 & 24 Vict. c. 145, Part II.

(*h*) See s. 32. As to the objections to relying on the powers under Lord Cranworth's Act, see 2 Dav. Prec., Part II., p. 89.

(*i*) 44 & 45 Vict. c. 41, s. 71.

(*k*) S. 19 (1), (3), (4).

(*l*) S. 21, sub-s. (4) makes the power of sale conferred by the Act exercisable by any person for the time being entitled to receive and give a discharge for the mortgage money.

(*m*) S. 21 protects purchasers where the power is irregularly exercised, and s. 22 makes the mortgagee's receipt for money arising under the power a good discharge. As to how the statutory power differs from the ordinary express power, see 2 K. & E. 20, note (*a*).

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S. 20. "(1) Notice requiring payment of the mortgage money has been served on the mortgagor or one of several mortgagors, and default has been made in payment of the mortgage money, or of part thereof for three months after such service; or

"(2) Some interest under the mortgage is in arrear and unpaid for two months after becoming due; or

"(3) There has been a breach of some provision contained in the mortgage deed or in the Act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage money or interest thereon."

It is therefore not now the practice to insert an express power of sale.

Mortgagee entering into possession.

In addition to the above remedies, the mortgagee may enter into possession of the mortgaged property; but that is a course which he is usually slow to adopt. The law in regard to this is thus stated by Mr. Davidson (*n*):—

"After default has been made in payment of the principal money or interest, or immediately after the execution of the mortgage, if there be no proviso for quiet enjoyment by the mortgagor until default, the mortgagee may enter into possession of the land, or, by giving notice to the tenants, into the receipt of the rents and profits; but the situation of a mortgagee in possession is far from an eligible one. On the principle that a mortgagee must make no advantage out of his mortgage beyond the payment of principal, interests, and costs, he is bound to account, upon terms of great strictness. The common decree is for an account 'of what he has received, or what he might have received, without his own wilful default.' He is chargeable with an occupation rent in respect of property in hand, and is liable for voluntary waste (as in pulling down houses, or opening mines); and it is by no means a matter of course that he should be allowed the cost of improvements. He may charge his actual expenses, but cannot stipulate for an allowance or commission to himself for the trouble of collecting the rents; nor can he on any pretext charge for his trouble in collecting the rents."

Power to cut timber.

By the Conveyancing and Law of Property Act, 1881 (*o*), in the case of a mortgage deed executed after 31st December, 1881,

(*n*) 2 Dav. Prec., Part II., pp. 90—92; and see *Noyes* v. *Pollock*, 32 Ch. Div. 53; where it was held by the Court of Appeal that the fact that mortgagees are in receipt of the rents and profits of the mortgaged estate, does not necessarily make them chargeable as mortgagees in possession, but that the question whether they are mortgagees in possession depends upon whether they have taken out of the mortgagor's hands the power and duty of managing the estate and dealing with the tenants. In that case no notices had been served on the tenants; and the rents were received by a person who was held to be agent for the mortgagor, though he paid them over to the mortgagees; and see also *Gaskell* v. *Gosling*, [1896] 1 Q. B. 669, at p. 691; and as to the rights and liabilities of a mortgagee in possession, Seton, vol. ii., p. 1632, *et seq.*

(*o*) 44 & 45 Vict. c. 41, s. 19 (1) (iv.).

power is conferred on a mortgagee while in possession, to cut and sell timber and other trees ripe for cutting, and not planted or left standing for shelter or ornament.

Receiver.

In continuation of the passage above quoted, Mr. Davidson proceeds:—

"But, although the mortgagee is precluded from charging for his own trouble in collecting, he is not obliged in all cases to take that trouble. He may, of his own authority, appoint a receiver, whenever the distance or the nature of the property is such as would require much time and trouble for the collection of the rents, and may allow and charge a reasonable remuneration for the services of such receiver. The remuneration allowed is generally five per cent. on the amount of rents collected; it may, of course, be less; but, unless in very extraordinary cases, it should not exceed that rate. A receiver so appointed is, of course, the agent of the mortgagee only. His possession is that of the mortgagee, who is chargeable with equal strictness, whether he receives the rents himself or through his agent. In either case, his position (as it has been sometimes expressed) is that of a bailiff without a salary, accountable to the mortgagor, but not paid by him. In order to enable the mortgagee to avail himself of the mortgage security (especially for keeping the interest regularly paid), without either incurring the responsibilities of a mortgagee in possession, or having recourse to his power of sale, it is usual, where any difficulty is apprehended, for the mortgagee to require from the mortgagor an attornment or power of distress (*p*) in respect of or over such part of the mortgaged property as may be in hand, by which he acquires the same remedy by distress as a landlord has for recovering rent in arrear; and, in respect of the property in the occupation of tenants, the appointment of a receiver, who is in law the agent and attorney of the mortgagor (*q*), and in respect of whose acts and receipts the mortgagee is, consequently, under no liability, but who is, in effect, the nominee of the mortgagee, and continued during his pleasure, and whose special duty it is to pay the mortgagee out of the rents received. The provisions of the class here described are more commonly restricted in their objects to providing for the regular payment of interest; but, of course, they may be, and sometimes are, extended to providing for the liquidation of the principal by instalments or otherwise."

Statutory power to

The power of appointing a receiver was conferred on mortgagees by Lord Cranworth's Act (*r*), but though the statutory

(*p*) These clauses are now practically useless owing to the provisions of the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 6; except that, as the attornment clause renders the mortgagor tenant of the mortgagee, it enables the latter to recover the land in a summary manner; *Kemp* v. *Lester*, [1896] 2 Q. B. 162. See 2 K. & E. 50, and 34 Sol. J. 704, 716.

(*q*) Being appointed under an authority given by the mortgagor, and not, as in the case first mentioned by Mr. Davidson, by the mortgagee alone, without any power from the mortgagor: see *Gaskell* v. *Gosling*, [1896] 1 Q. B. 669, at p. 692.

(*r*) 23 & 24 Vict. c. 145, Part II. See 2 K. & E. 243.

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appoint receiver.

powers thereby given were as beneficial, or nearly so, to the mortgagee as those commonly conferred by the mortgage deed (where it contains any such power), they were thought by some to be unduly stringent on the mortgagor, in subjecting him to the liability of having a receiver appointed (as the Act authorizes) if the mortgage money remained owing beyond the stipulated time, though there were no other default. It was therefore sometimes thought expedient to exclude the operation of this statute. These provisions of Lord Cranworth's Act have, to the extent above mentioned, been repealed (*s*), and in lieu thereof, in the Conveyancing and Law of Property Act, 1881 (*t*), with regard to mortgages executed after 31st December, 1881, powers are given corresponding to those usually inserted in a mortgage deed, for the mortgagee, when the mortgage money has become due, to appoint a receiver of the income of the property (*u*), but he may not exercise this power until he has become entitled to exercise the power of sale conferred by the Act.

Receiver appointed by Court for legal mortgagee.

Under the old law a legal mortgagee, *i.e.*, a mortgagee who has the legal estate (and therefore a legal right to possession), could not obtain the appointment of a receiver by the Court of Chancery, because, it was said, it was his duty to take possession himself if he wanted it; but if there was a prior mortgage, so that he had no legal right (*i.e.*, no right at Common law) to the property, he could get a receiver appointed. But since the Judicature Act (*x*) the Court does sometimes appoint a receiver at the instance of a legal mortgagee, though he could take possession for himself (*y*).

Insurance.

For the protection of the property mortgaged, where the mortgage includes buildings, it has been usual to provide in the deed that the mortgagor shall keep the buildings insured, and that on his failure to do so, the mortgagee may pay the premiums necessary for the purpose, and add the amount to the mortgage debt (*z*). Lord Cranworth's Act (*a*) conferred a power on the mortgagee to pay the insurance on omission of the mortgagor to

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(*s*) 44 & 45 Vict. c. 41, s. 71.

(*t*) 44 & 45 Vict. c. 41, ss. 19 and 24. See 2 K. & E. 53; *ib.*, 243.

(*u*) See the form, 2 K. & E. 53.

(*x*) 36 & 37 Vict. c. 66, s. 25, sub-s. 8.

(*y*) *Per* North, J., *Re Prytherch*, 42 Ch. Div. 590, 600; see *Tillett* v. *Nixon*, 25 Ch. Div. 238; *Mason* v. *Westoby*, 32 Ch. Div. 206; *County of Gloucester Bank* v. *Rudry Merthyr, &c., Co.*, [1895] 1 Ch. 629.

(*z*) For form, see 2 K. & E. 41.

(*a*) 23 & 24 Vict. c. 145, Part II.

do so, where by the terms of the deed he ought to pay. But the provisions of that Act being very incomplete, it has been the practice to continue to insert the usual provision in the deed. And now the Conveyancing and Law of Property Act, 1881, in regard to a mortgage made by deed executed after 31st December, 1881, has conferred on the mortgagee a power at any time after the date of the mortgage deed, to insure and keep insured buildings and other property of an insurable nature on the mortgaged property (*b*); the Act at the same time, to the extent above mentioned, repeals the provisions in this respect of Lord Cranworth's Act.

Pursuing all remedies at once.

While on the subject of the mortgagee's remedies, it should be mentioned that, contrary to the general rule that a person liable to be sued is not to be harassed by a multiplicity of actions, it is the right of the mortgagee, so long as any part of his debt remains unpaid, to enforce at the same time all his legal and equitable remedies (*c*). He may, at the same time, enter and take possession of the property (or bring his action for possession), sue the mortgagor on his covenant to pay, and proceed to foreclose the equity of redemption of the property (*d*) or obtain a sale by the Court. And now he may in one action, without special leave, sue upon the covenant (*e*), and also for foreclosure, and for possession (*f*). If, having foreclosed, he sell, and the proceeds of sale do not cover his debt, he cannot then sue on the covenant, for the mortgagor, on paying the money due on the mortgage, is entitled to a reconveyance of the mortgaged property (*g*), and the mortgagee has deprived himself of the power of restoring it to the mortgagor on being paid off (*h*). But, if the mortgagee, having obtained foreclosure, does not sell but sues on the covenant, he thereby opens the foreclosure; and the mortgagor may assert his right to redeem the estate, notwithstanding the foreclosure. And, if the mortgagee, instead of foreclosing, sells the mortgaged property under his power of sale, or obtains a sale

(*b*) 44 & 45 Vict. c. 41, ss. 19 and 23. See Appendix. *post*.

(*c*) See 32 Sol. J. 717.

(*d*) *Cockell* v. *Bacon*, 16 Beav. 159.

(*e*) As to form of decree, see *Hunter* v. *Myatt*, 28 Ch. Div. 181. As to the effect of a judgment upon the covenant to pay interest, see *Ex parte Fewings*, 25 Ch. Div. 338.

(*f*) *Tawell* v. *Slate Co.*, 3 Ch. Div. 629; *Wood* v. *Wheater*, 22 Ch. Div. 281; and *Hoar* v. *Loe*, W. N. 1884, 241.

(*g*) *Kinnaird* v. *Trollope*, 39 Ch. Div. 636.

(*h*) *Perry* v. *Barker*, 8 Ves. 327 a; 13 Ves. 198; *Walker* v. *Jones*, L. R. 1 P. C., at p. 61; *Lockhart* v. *Hardy*, 9 Beav. 356, See 32 Sol. J. 717.

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by the Court in lieu of foreclosure, he can sue the mortgagor personally for any deficiency (*i*).

Devolution of mortgage estate on death of mortgagee.

Formerly, if the debt was repaid after the death of the mortgagee, it was necessary that the property mortgaged should be reconveyed by the devisee, where the mortgagee had by his will devised his mortgage estates, or, if he died intestate as to such estates, then by his heir. But as expense and inconvenience not unfrequently arose from the heir being unable, by reason of infancy or otherwise, to convey, or not being ascertainable (*k*), a partial remedy was applied by the Vendor and Purchaser Act, 1874 (*l*), which empowered the legal personal representative of a mortgagee of a freehold estate (or of a copyhold estate to which the mortgagee had been admitted), on payment of all sums secured by the mortgage (*m*), to convey (or surrender) the mortgaged estate. This section, in the case of mortgagees dying after the 31st December, 1881, is repealed by the Conveyancing and Law of Property Act, 1881 (*n*); but such repeal is not to affect the validity or invalidity, or any operation, effect, or consequence of any instrument executed or made, or of any thing done or suffered before the 31st December, 1881 (*o*). By the last-mentioned Act (*p*), on the death of the mortgagee, notwithstanding any testamentary disposition, the estate is made to vest in his personal representatives or representative from time to time in like manner as if it were a chattel real vesting in them or him. The result is, that for the future a mortgagee's estate must go to his personal representatives or representative, and if he wishes it to go to a particular person, that can only be effected by appointing him an executor for that special purpose. This section has been repealed by the Copyhold Act, 1887 (*q*), repealed and re-enacted by the Copyhold Act, 1894 (*r*), so far as regards copyholds vested in the tenant on the Court Rolls of any manor on trust or by way of mortgage.

Transfers.

Before 1882, on the mortgage debt being satisfied, the persons

(*i*) *Willes* v. *Levitt*, 1 De G. & Sm. 392; *Rudge* v. *Richens*, L. R. 8 C. P. 358.

(*k*) 2 Dav. Prec., Part II., p. 37.

(*l*) 37 & 38 Vict. c. 78, s. 4.

(*m*) *In re Spradbury's Mortgage*, 14 Ch. Div. 514.

(*n*) 44 & 45 Vict. c. 41, s. 30.

(*o*) S. 71 (2).

(*p*) S. 30.

(*q*) 50 & 51 Vict. c. 73, s. 45. *In re Mills*, 37 Ch. Div. 312, North, J., held that this provision is retrospective; but the Court of Appeal found it unnecessary to decide the point, and expressed no opinion upon it; S. C. 40 Ch. Div. 14.

(*r*) 57 & 58 Vict. c. 46, s. 88. This Act repealed the Copyhold Act, 1887.

in whom the mortgage debt and mortgaged property were vested were not bound, in the absence of a provision, which was usually inserted (*s*), to assign the mortgage debt to any person (*t*), or to convey the mortgaged property to any person other than the owner of the equity of redemption (*u*). But since 1881 the owner of the equity of redemption has had power to require them to assign the mortgage debt and to convey the mortgaged property as he directs (*x*).

The extent and meaning of the provision in the Conveyancing and Law of Property Act, 1881, was explained in *Teevan* v. *Smith* (*y*), by Jessel, M.R., as follows:—

"We must remember what the law was before that Act was passed. A mortgagor had only a right to redeem and to have a reconveyance on payment of the mortgage debt. Hence a difficulty arose, for lenders were willing to advance money if they could have a transfer of the mortgage security, but were not willing to take a security directly from the mortgagor, dreading intermediate incumbrances. At that time the debt was not transferable, so that a power of attorney was necessary; therefore, the old decisions were right in laying down that a mortgagee was not to be required to run the risk of being made liable to costs, which he might be, if he transferred the debt to a third person. Now the difficulty has been got rid of, by making the debt transferable at law, so that no power of attorney is required, and all ground of objection on the part of a mortgagee to transfer the security is taken away. It can do him no harm in any way.

"Then, what are the words of the 15th section of the Act of 1881? It says, 'where a mortgagor is entitled to redeem.' Every mortgagor is entitled to redeem, but there is a difference in their rights. Where there is one mortgagor and one mortgagee, there, of course, his right to redeem is absolute. But where there are several successive mortgagees the mortgagor can redeem the next to him without redeeming any other; but if he wishes to redeem any anterior mortgage he must also redeem all who are between that mortgagee and himself. A puisne mortgagee, indeed, is in rather a worse position than this; for, although he is entitled to redeem those above him, he cannot do so without foreclosing those between himself and the ultimate equity of redemption. So that the words, 'where a mortgagor is entitled to redeem,' really include every mortgagor, except a mortgagor who is precluded by some special term in his mortgage deed from redeeming within a specific time. For although the law will not allow a mortgagor to be precluded from redeeming altogether, yet he may be precluded from redeeming for a fixed period, such as five or seven years. That is why the words 'where a mortgagor is entitled to redeem,' are inserted. They mean

(*s*) Elph. Introd. 146.

(*t*) *Dunstan* v. *Patterson*, 2 Ph. 341.

(*u*) *James* v. *Biou*, 3 Swanst., at 241; *Colyer* v. *Colyer*, 3 De G. J. & S. 676, *per* Turner, L.J., at 693.

(*x*) 44 & 45 Vict. c. 41, s. 15.

(*y*) *Teevan* v. *Smith*, 20 Ch. Div. 723.

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where a mortgagor is not precluded from redeeming for a certain time by some special stipulation. Then it says, 'he shall have power to require the mortgagee, instead of reconveying, and on the terms on which he would be bound to reconvey, to assign the mortgage debt and convey the mortgaged property to any third person.' It is only 'instead of reconveying.' The section assumes two things: First, that the mortgagee is bound to reconvey to the person applying to him; and, secondly, that the transfer is to be instead of a reconveyance. Then see how it works. Where there are first and second mortgagees, and the first mortgagee has notice of the second, when he is paid off he becomes a trustee of the legal estate for him. The word 'reconvey' is the proper word to use; it is strictly a reconveyance. If the first mortgagee is paid off by the mortgagor, he is not bound to reconvey the estate to him; but if he is paid off by the second mortgagee, he is bound to reconvey it to him. The second mortgagee is a mortgagor under the definition in the Act (*z*). He is an assign of the mortgagor, and is entitled to redeem. It appears to me that no person can avail himself of the 15th section who is not entitled to call for a reconveyance of the estate from the mortgagee. The Act never intended to effect any change in the person who was entitled to call for a reconveyance."

Subsequently, the above right given to the mortgagor by the Act of 1881, has been extended by the Conveyancing Act, 1882 (*a*), so that it may be enforced by each incumbrancer, or by the mortgagor, notwithstanding any intermediate incumbrance; but a requisition to assign the debt and convey the property by an incumbrancer is to prevail over a requisition by the mortgagor, and as between incumbrancers a requisition of a prior incumbrancer is to prevail over a requisition of a subsequent incumbrancer.

The above provisions do not apply in the case of a mortgagee being or having been in possession; for, it is said, he is liable to account, and the mortgagor cannot release his liability to mesne incumbrancers (*b*); but they apply to mortgages made either before or after the commencement of the Act, and have effect notwithstanding any stipulation to the contrary (*c*).

Descent or devolution of equity of redemption.

The equity of redemption is considered in equity not as a mere right but as an estate in the land (*d*), and therefore alienable by the mortgagor; and it will descend on his death to his devisee or heir, according as he dies testate or intestate. In other words,

(*z*) 44 & 45 Vict. c. 41, s. 2.

(*a*) 45 & 46 Vict. c. 39, s. 12.

(*b*) 44 & 45 Vict. c. 41, s. 15 (2). See note in W. B. & C., p. 58.

(*c*) *Ib.* s. 15 (3).

(*d*) 2 Spence, 642; 2 Cruise, Dig. Tit. xv., Ch. III., p. 92; *per* Wigram, V.-C., in *Downe* v. *Morris*, 3 Hare, at p. 404: and *per* Lord Selborne, C., in *Heath* v. *Pugh*, 6 Q. B. D. 360, citing *Casborne* v. *Scarfe*, 1 Atk. 603; S. C. 2 W. & T.

the mortgagor is deemed the owner as before, subject only to the charge; the debt being a personal debt, for which the land is a security. Accordingly it was held that, on the death of the mortgagor, the debt was payable (as between persons claiming under the mortgagor) in the first instance out of the personal estate of the mortgagor, and (as between such persons) the land could only be resorted to if the personal estate was not sufficient to pay. This, however, was altered by the Real Estate Charges Act, 1854, commonly called Locke-King's Act (*e*), as regards persons claiming under a will, deed, or document made after the 31st December, 1854 (*f*). By that Act it is enacted that the heir or devisee of the land shall not be entitled to have the debt discharged out of the personal estate or other real estate (*g*) of the deceased (mortgagor); but, that as between the different persons claiming under or through the deceased, the land is to be primarily liable to the payment of all mortgage debts with which the same shall be charged, unless by his will or deed, or other document, the deceased has signified any contrary or other intention. There is a proviso that the Act is not to affect or diminish any right of the mortgagee himself to obtain payment either out of the personal estate of the mortgagor or otherwise. In cases to which the Act applies, therefore, if a mortgagee has enforced payment out of the personal estate, the persons entitled to the personal estate have a right to be recouped out of the mortgaged real estate.

The Real Estate Charges Acts, 1854, 1867, 1877 (Locke-King's Act).

A general direction by a testator in his will "that his debts were to be paid" or "to be paid out of his estate," was held not to be an expression of a contrary intention within the meaning of the Act; but a direction that they should be paid "out of his personal estate," or "out of his residuary real and personal estate," was a sufficient declaration of a contrary intention to enable the devisee to take the mortgaged land discharged of the debt (*h*). In consequence of these decisions, the Real Estate Charges Act, 1867, was passed (*i*), by which it is enacted that in the construction of the will of any person dying after 31st December, 1867, a general direction for payment of debts out of the personal

Act of 1867.

(*e*) 17 & 18 Vict. c. 113. See this Act and the amending Acts, with notes, in Shelf. R. P. Stat. 391, *et seq.*

(*f*) Observe that the Act does not apply where a will was *made* before 1855, although the testator die after 1854.

(*g*) *Re Newmarch*, 9 Ch. Div. 12.

(*h*) See *Stone* v. *Parker*, 1 Dr. & Sm. 212.

(*i*) 30 & 31 Vict. c. 69.

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estate shall not be deemed to be a declaration of intention contrary to or other than the rule established by the former Act, unless such contrary or other intention shall be further declared by words expressly, or by necessary implication, referring to all or some of the testator's debts charged by way of mortgage on any part of his real estate (*k*), and the word "mortgage" shall in both Acts extend to any lien for unpaid purchase-money upon lands purchased "by a testator." The Act of 1854 mentioned the heir and devisee alone, therefore a mortgage of leaseholds (which, being personalty, does not descend to the heir or devisee, but devolves on the personal representative) was not included; and the Act of 1867 made no difference in this respect (*l*). The Act of 1867 further spoke only of a general direction for payment of debts out of personal estate; and the word "mortgage" was made to extend to a lien for unpaid purchase-money only in respect of lands purchased "by a testator," omitting the case of the purchaser having died intestate. To supply these omissions

Act of 1877.

the Real Estate Charges Act, 1877 (*m*), was passed extending the application of the Acts of 1854 and 1867 to "a testator or intestate dying after the 31st December, 1877, seised or possessed of or entitled to any land or other hereditaments of whatever tenure" at the time of his death charged with payment of money by way of mortgage, or any other equitable charge (*n*), including any lien for unpaid purchase-money. Thus the rule established by the Act of 1854 was made to apply to leaseholds (*o*) as well as to freeholds, and to a lien for unpaid purchase-money in respect of lands purchased by an intestate, as well as those purchased by a man who had made his will. Further, the Act of 1877 provided that "the devisee, or legatee, or heir," shall not be entitled to have the mortgage debt or other charge discharged out of any other estate of the deceased, unless (in the case of a testator) he shall have signified a contrary intention, which shall not be deemed to

(*k*) As to the expression of a contrary intention, see *Re Fleck*, *Colston* v. *Roberts*, 37 Ch. Div. 677; and see *Re Smith*, *Hannington* v. *True*, 33 Ch. Div. 195.

(*l*) *In re Wormsley's Estate*, 4 Ch. Div. 665.

(*m*) 40 & 41 Vict. c. 34. See the remarks of Kay, J., on these Acts in *Re Cockcroft*, 24 Ch. Div. 94.

(*n*) As for instance the charge on land taken in execution under an *elegit*; *Re Anthony*, [1892] 1 Ch. 450. But the Acts were held not to apply in the like case as to lands of which the judgment debtor was tenant in tail; *Re Anthony*, [1893] 3 Ch. 498; for they operate only as between the persons taking the land through the debtor.

(*o*) *Re Kershaw*, 37 Ch. Div. 674.

be signified "by a charge of, or direction for, payment of debts upon or out of residuary real and personal estate, or residuary real estate;" thus entirely getting rid of the rule that any general direction for payment of debts signified a contrary intention, and, in fact, recognising (at any rate as regards persons dying after the 31st December, 1877) the explanation of a declaration of a contrary intention first given by Giffard, V.-C. (*p*), and subsequently followed by other Judges (*q*)—namely, that it must be "a direction applying to his mortgage debts in such terms as distinctly and unmistakeably to refer to or describe them." It should be added that where real estate and personal estate are comprised in the same mortgage, the debt must be borne rateably by the real and personal estate subject thereto (*r*), to the value of their respective portions. And so in the case of different portions of a mortgaged estate being devised to different persons, the devisees must contribute accordingly (*s*).

Rateable contribution.

We have said that the equity of redemption may be alienated by the mortgagor, and have treated of its descent on his death. We will now consider his alienation of it during his life—(1) by way of mortgage; (2) by way of sale. It will have been understood that after the mortgage of the legal estate in the land there is nothing left to the mortgagor with which to deal except the equity of redemption. As a protection to subsequent, or, as they are often called, "puisne" mortgagees or incumbrancers, it has been provided by the Statute 4 & 5 Will. & Mary, c. 16 (s. 2), that if a person shall further mortgage lands, a former mortgage being in force and not discharged, and not discover in writing to the second or other mortgagee the former mortgage or mortgages, the mortgagor shall have no relief or equity of redemption against such second or other mortgagees, and they shall take the land as against him freed from such equity, and as fully as if the mortgage had been an absolute purchase. The Act, however, takes away the right of redemption from the mortgagor only, but reserves the right of redemption of the subsequent

Mortgage of equity of redemption.

Statutory protection to *puisne* mortgagees.

(*p*) *Nelson* v. *Page*, L. R. 7 Eq. 27.

(*q*) Jessel, M.R., in *Gall* v. *Fenwick*, 43 L. J. Ch. 178; and *Sackville* v. *Smyth*, *ib.* 494; Malins, V.-C., in *Lewis* v. *Lewis*, L. R. 13 Eq. 227; Jessel, M.R., in *Re Rossiter*, 13 Ch. Div. 355.

(*r*) *Tretrail* v. *Mason*, 7 Ch. Div. 655 (*per* Hall, V.-C.). And see *Leonino* v. *Leonino*, 10 Ch. Div. 460.

(*s*) See *Re Newmarch*, 9 Ch. Div. 12, and judgment of Jessel, M.R., giving a short epitome of these Acts.

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mortgagees (if any) (*t*). The equity of redemption is, in fact, transferred to them absolutely. Thus, in cases to which the Act applies, a second or third mortgagee may redeem the estate from the prior incumbrancers by paying their debts; and, if there are no incumbrances subsequent to his own, he will become absolutely entitled to the land at law and equity. Further, by the Law of Property Amendment Acts, 1859 and 1860, commonly known as Lord St. Leonards' Acts, 1859, 1860 (*u*), any seller or mortgagor, or his solicitor, or agent, who conceals any instrument material to the title or any incumbrance from the purchaser or mortgagee, in order to induce him to accept the title, with intent to defraud, shall be guilty of a misdemeanour, and liable to fine or imprisonment, and also liable to an action for damages at the suit of the purchaser or mortgagee or those claiming under them.

Tacking.

In cases where there has been a first mortgage of the legal estate followed by successive mortgages of the equity of redemption, we have to consider the position of the mortgagees *inter se*, where a mortgage has been made to a third mortgagee *without notice* of the second mortgage. The doctrine was laid down by Hale, C.B., and others, so long ago as 22 Car. II. (*x*), and still prevails, that a *puisne* mortgagee, who advanced his money without notice of a "mesne," that is, intermediate, incumbrance, may by tacking, *i.e.*, purchasing the first incumbrance (being a mortgage of the legal estate), thereby protect his *puisne* mortgage against any person having a mortgage subsequent to the first incumbrance but prior to his own, though he purchased such first incumbrance after he had notice of the subsequent incumbrance.

Thus, if there be—1st, a legal mortgage to A. for £1,000; 2ndly, an equitable mortgage to B. for £500; and, 3rdly, an equitable mortgage to C. for £200; then C. may, if he had no notice of B.'s mortgage at the time when he lent his £200, pay off A. and take a transfer of A.'s mortgage; he will then be entitled to priority for £1,200 over B.'s £500.

Absence of notice, and getting in legal estate.

The conditions which must be satisfied in order to entitle the subsequent mortgagee to obtain priority by tacking over a prior equitable mortgage are (1) that he had no notice, whether actual or constructive, of such prior mortgage at the time when he took

(*t*) 4 & 5 Will. & Mary, c. 16, s. 4.

(*u*) 22 & 23 Vict. c. 35, ss. 24, 25; and 23 & 24 Vict. c. 38, s. 8.

(*x*) *Marsh* v. *Lee*, 1 W. & T. 696.

his own mortgage, and (2) that he has obtained the legal estate from the first mortgagee.

Notice at time of taking mortgage.

"It is not a question of what a man knows when he does that which will better or perfect his security, but what he knows at the time when he took his security and paid his money. The principle always has been this, that if a man, with ignorance of a previous incumbrance, takes a mortgage or makes a purchase, when he finds out the truth, he may take such steps as he can in order to protect his weak security or his weak purchase" (*y*).

"The crucial point as to notice is the time of parting with the money and taking the security. A person who, without any notice of the prior incumbrances, takes the security, is at liberty, notwithstanding subsequent notice, to perfect that security which he has taken" (*z*).

The mortgagee who purchases the first incumbrance, is said to "tack" his puisne incumbrance on to it (*a*). The second mortgagee, though he give notice of his advance to the first, cannot prevent the third from tacking if the latter advanced his money and took his security without notice of the second mortgage (*b*).

This want of notice (*c*) is the sole equity which places the subsequent mortgagee on an equal footing with the prior equitable mortgagee; and obtaining the legal estate from the first mortgagee gives him the priority. In like manner, if the first mortgagee, having the legal estate, make a further advance without notice of a second mortgage, the second mortgagee cannot redeem the first mortgagee without paying off his further advance as well as his original loan (*d*). It was formerly held, that, where the original

Further advance to first mortgagee.

(*y*) *Per* Cotton, L.J., *Mutual Life Assurance Society* v. *Langley*, 32 Ch. Div. 460, at p. 468. See also *Blackwood* v. *Chartered Bank of Australia*, L. R. 5 P. C., at 111; *Taylor* v. *Russell*, [1891] 1 Ch. 8, at p. 27. See S. C. in H. L., [1892] A. C. 244, where (at p. 259) Lord Macnaghten said:—"It is not disputed that an equitable mortgagee who has advanced his money without notice of a prior equitable mortgage may gain priority by getting in the legal estate, unless the circumstances are such as to make it inequitable for him to do so, as would be the case, for example, if the legal estate were held upon express trusts, or, according to recent authorities, if it were vested in a satisfied mortgagee." See, as to the latter point, *Powell* v. *London and Provincial Bank*, [1893] 1 Ch. 610. As to the protection afforded to other equitable owners who get in the legal estate, see *Bailey* v. *Barnes*, [1894] 1 Ch. 25, at p. 37; *London and County Banking Co.* v. *Goddard*, 45 W. R. 310.

(*z*) *Per* Fry, L.J., 32 Ch. Div., at p. 473.

(*a*) Elph. Introd. 213.

(*b*) *Peacock* v. *Burt*, 4 L. J. (N. S.) Ch. 35; and *Wortley* v. *Birkhead*, 2 Ves. Sen. 571, note.

(*c*) *Marsh* v. *Lee*, 1 W. & T. 702.

(*d*) *Per* Lord Hardwicke, *Morret* v. *Paske*, 2 Atk. 53; *Wyllie* v. *Pollen*, 11 W. R. 1081.

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mortgage was expressly made a security for further advances, and a second mortgagee lent his money with notice of this, the first mortgagee might tack his further advances made subsequently to the second mortgage, though he had notice of it; but this doctrine has been overruled, and it is now settled that, if the first mortgagee make a further advance with notice of the mesne incumbrance, he will not be entitled to priority in respect of such further advance (*e*).

Sale of equity of redemption.

It remains to consider the effect of a sale of the equity of redemption by the mortgagor. The purchaser acquires the right to redeem as against the mortgagee; but he does not incur any personal liability to the mortgagee (*f*), though, as between himself and the mortgagor, he must indemnify the latter against his personal liability to the mortgagee (*g*). The sale of the equity of redemption to a stranger does not affect the rights and liabilities of the mortgagor and mortgagee *inter se*. The mortgagee can still sue the mortgagor on his covenant, and, if paid off by the mortgagor, must reconvey to him (*h*). But, in such a case, as the mortgagor has parted with his beneficial interest in the property, he requires the legal estate only for the purpose of compelling the owner of the equity of redemption to repay the money paid to the mortgagee: and accordingly the reconveyance by the mortgagee in such cases should not be in form absolute, but subject to the equity of redemption vested in any person other than the mortgagor (*i*). But, if the purchaser of the equity of redemption pay off a mortgage, it was held in *Toulmin* v. *Steere* (*k*), he cannot set up the mortgage so paid off against any of the subsequent incumbrances of which he had notice, unless the paid-off mortgage is kept on foot, either by an express assignment of it in trust for the purchaser, or by some expression of an intention that it shall continue to subsist. This decision, however, has been much criticised; and its effect is somewhat modified by subsequent cases (*l*).

Keeping on foot of paid-off mortgage.

The doctrine of *Toulmin* v. *Steere*.

(*e*) *Hopkinson* v. *Rolt*, 9 H. L. C. 514; *Bradford Banking Co.* v. *Briggs*, 12 App. Cas. 29; note to *Marsh* v. *Lee*, 1 W. & T. 714. As to what amounts to notice, see *post*, p. 294; *Saffron Walden Building Society* v. *Rayner*, 10 Ch. Div. 696; and the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 3.

(*f*) *Re Errington*, [1894] 1 Q. B. 11.

(*g*) *Waring* v. *Ward*, 7 Ves., at p. 337.

(*h*) *Palmer* v. *Hendrie*, 27 Beav. 349; 28 Beav. 341.

(*i*) *Pearce* v. *Morris*, L. R. 5 Ch. 227; *Kinnaird* v. *Trollope*, 39 Ch. Div. 636.

(*k*) 3 Mer. 210. And see *per* James, L.J., in *Adams* v. *Angell*, 5 Ch. Div. 647.

(*l*) See *Thorne* v. *Cann*, [1895] A. C.

The facts in *Toulmin* v. *Steere* (*m*) were as follows:—

The property in question belonged to Witts, subject to a mortgage in fee to Harrison. In 1805, Ann Simpson purchased an annuity secured on the estate, she having notice of the mortgage. In 1806, Witts further mortgaged to Wilby, who paid off the mortgage to Harrison, and took a transfer to himself. Trustees (with sanction of the Court of Chancery) bought the property from Witts, paid Wilby both mortgage debts, and he joined in the conveyance. The trustees purchased with constructive notice of the annuity, but it did not appear whether Wilby had, at the time of his loan, any notice of it. It was held that the trustees could not set up the mortgage as a subsisting charge in priority to the annuity.

The doctrine in the case of *Toulmin* v. *Steere* was considered in the case of *Adams* v. *Angell* (*n*), in which the facts were as follows:—

After a decree in a foreclosure suit to which both the mortgagor and the first and second mortgagees were parties, the plaintiff, the first mortgagee, purchased the equity of redemption from the trustee in bankruptcy of the mortgagor, and by the deed of assignment, in consideration of £1,380 (the sum due on the first mortgage) retained by the first mortgagee, "in full satisfaction of his debt, and of £20 paid to the trustee" (making the purchase-money of £1,400), the trustee assigned the mortgaged property to the first mortgagee, "subject to the aforesaid claim" of the second mortgagee. The value of the mortgaged property did not exceed £1,380. The second mortgagee contended that the effect of this purchase was to extinguish the first mortgage debt, and to let in his own charge as a first incumbrance. It was held by the Court of Appeal (affirming the decision of Hall, V.-C.), that looking at the circumstances, the conveyance sufficiently expressed an intention to keep the first mortgage alive; and that *Toulmin*

11, where *Toulmin* v. *Steere* (*ubi sup.*) was reflected on; and in *Liquidation Estates Purchase Co.* v. *Willoughby*, [1896] 1 Ch. 726 (C. A.) it was observed (at p. 734) that having regard to the decision in *Thorne* v. *Cann* (*ubi sup.*), "it is perhaps now safe to say that, where a purchaser of property pays off a charge on it, without showing an intention to keep it alive, still, if its continuance as an existing charge will be beneficial to him, it will be treated in equity as subsisting, unless an intention to the contrary can be inferred from the terms of the purchase deed or from other legitimate evidence."

(*m*) 3 Mer. 210. See also the notes to *Forbes* v. *Moffatt* (18 Ves. 384), in Tud. L. C. R. P. 943, *et seq.*

(*n*) 5 Ch. Div. 634.

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v. *Steere* did not apply. Jessel, M.R. (in the Court of Appeal), said :—

"Assuming *Toulmin* v. *Steere* to be binding upon us, it amounts to no more than this, that in the case of a purchase from the owner of an equity of redemption, in which the purchase-money is partly applied in paying off incumbrances, the purchaser with notice, whether actual or constructive, of other incumbrances, is not, *in the absence of any contemporaneous expression of intention*, entitled as against the other incumbrancers, of whose securities he has notice, to say afterwards that the incumbrances so paid off are not extinguished. It does not go beyond that; and there are several authorities which say that this doctrine is not to be carried further. Now in a Court of Equity it has always been held that the mere fact of a charge having been paid off, does not decide the question whether it is extinguished. If a charge is paid off by a tenant for life, without any expression of his intention, it is well established that he retains the benefit of it against the inheritance. Although he has not declared his intention of keeping it alive, it is presumed that his intention was to keep it alive, because it is manifestly for his benefit. On the other hand, when the owner of an estate in fee or in tail pays off a charge, the presumption is the other way; but in either case the person paying off the charge can, by expressly declaring his intention, either keep it alive or destroy it. If there is no reason for keeping it alive, then, especially in the case of an owner in fee, equity will, in the absence of any declaration of his intention, destroy it; but if there is any reason for keeping it alive, such as the existence of another incumbrance, equity will not destroy it. So, in the case of a purchase, there is no doubt that the purchaser who pays off a charge, though merely equitable, may have it assigned to a trustee for himself, and it will protect him against mesne incumbrances if there are any. So, also, it is admitted, that if without going through the ceremony of the assignment of an equitable charge—an assignment which really passes nothing—a declaration is inserted in the deed that the charge shall be treated as remaining on foot for the purpose of protecting the purchaser against mesne incumbrances, then the charge is treated as remaining on foot, and protects him. The intention, therefore, if expressed, governs the case; but if no intention is expressed, then *Toulmin* v. *Steere* says, that the incumbrance which is paid off is merged, and the subsequent incumbrancers let in."

It appears from the judgment that, notwithstanding the doctrine laid down by *Toulmin* v. *Steere*, a prior legal mortgage, though paid off, may, if the intention to keep it on foot is sufficiently expressed (*o*), be used by the purchaser of the equity of redemption, as a protection against the intervening incumbrances (*p*). Two forms for keeping the mortgage on foot where

(*o*) Or, probably, under some circumstances, unless an intention to the contrary can be inferred; see *ante*, p. 218, note (*l*); and see *Re Pride*, [1891] 2 Ch. 135.

(*p*) *Marsh* v. *Lee*, 1 W. & T., 5th ed., p. 678. See the remarks in Dart, V. & P. 1040, 1041.

the purchaser has paid off a mortgage debt out of the purchase-money are in use, exemplifying the cases referred to by Jessel, M.R.—the one being an assignment of the debt and conveyance of the legal estate to a trustee for the purchaser, the other a mere declaration that it is intended to keep the mortgage alive (*q*).

Payment into Court to meet incumbrances.

By the Conveyancing and Law of Property Act, 1881 (*r*), when land subject to any incumbrance is sold by the Court, or out of Court, the Court may, on the application of any party to the sale, direct or allow payment into Court of an amount sufficient to meet the incumbrance, together with interest, and to provide for costs and expenses; and upon such payment the Court may declare the land to be freed from the incumbrance.

Implied covenants for title.

In addition to the shortening of mortgage deeds effected by the Conveyancing and Law of Property Act, 1881, by making incident to the estate of the mortgagee a power of sale, and other powers hitherto usually inserted in the deed, as above pointed out, covenants for title by the mortgagor may be implied by his conveying, and being expressed to convey "as beneficial owner" (*s*). These are absolute covenants (*t*) that he has a right to convey, that the mortgagee shall have quiet enjoyment of the property after default (*u*), free from incumbrances, and for further assurance. The same Act (*x*), provided short forms of deeds of statutory mortgage, statutory transfer, and statutory reconveyance (*y*).

Statutory forms.

Right to inspect documents.

A mortgagor, including any person deriving title under the original mortgagor, or entitled to redeem, is, where the mortgage was made since 1881, entitled to inspect and make copies from the documents of title relating to the mortgaged property in the custody of the mortgagee (*z*).

Consolidation (*a*).

There is another doctrine relating to redemption, which may

(*q*) 2 Dav. Prec., Part I., 326, 333; 1 K. & E. 446.

(*r*) 44 & 45 Vict. c. 41, s. 5.

(*s*) 44 & 45 Vict. c. 41, s. 7 (1) (c).

(*t*) That is to say, that, while in conveyances upon sales the covenants are restricted to the acts and omissions of the vendor, and the ancestors and testators through whom he claims, the covenants in mortgage deeds and securities for money are unrestricted, and amount to a warranty against and for the acts and omissions of the whole world (1 Dav. Prec., p. 97). See, as to covenants for title, *post*, p. 377.

(*u*) See *ante*, p. 200.

(*x*) 44 & 45 Vict. c. 41, ss. 26 to 29..

(*y*) See 3rd Schedule.

(*z*) Conv. and Law of Prop. Act, 1881, s. 2 (vi.), 16. See Elph. Introd. 110; 33 Sol. J. 707.

(*a*) Elph. Introd. 212; 1 K. & E. 481.

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affect a purchaser or mortgagee (*b*) of an equity of redemption; namely, that, if the owner of different estates mortgage them separately to the same person, for distinct debts, the mortgagee may insist that one security shall not be redeemed alone, upon the principle that, redemption being an equitable right, the person who redeems must on his part do equity towards the mortgagee and redeem him entirely: not taking one of his securities, and leaving him exposed to the risk of deficiency as to the other. This is called the right of consolidation—the right to unite securities given for several debts on different estates until payment of the aggregate amount of the debts secured. Therefore a second mortgagee, in addition to the risk of being squeezed out by tacking, is liable to the risk of being squeezed out by consolidation (*c*).

The right to consolidate may be enforced not only in an action for redemption, but also in an action for foreclosure, and even in case of a sale under the power of sale in one of the mortgages (*d*), and whether the mortgage in respect whereof the right is claimed is legal or equitable (*e*).

The right may be exercised by a transferee of two mortgages on different estates though originally mortgaged to different persons, on the ground expressed by Knight-Bruce, L.J., that—

> "The second incumbrancer must be deemed to have taken his security with knowledge that the two mortgages on the two estates, though then belonging to different mortgagees, might coalesce, and with knowledge of the possible consequences of their coalition" (*f*).

The right to consolidate exists only where, at the time when redemption is sought, all the mortgages are vested in one person and all the equities of redemption are vested in one person, or where, after that state of things has once existed, the equities of redemption have become separated (*g*).

It follows that the right does not exist where one of the mortgages is created subsequently to the assignment of the equity of redemption of the other mortgage to the person seeking to

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(*b*) *Beevor* v. *Luck*, L. R. 4 Eq. 537.

(*c*) See 2 Dav. Prec. ii. 293, note.

(*d*) *Selby* v. *Pomfret*, 3 De G. F. & J. 595.

(*e*) *Neve* v. *Pennell*, 2 H. & M. 170.

(*f*) *Vint* v. *Padget*, 2 De G. & J. 613.

(*g*) *Pledge* v. *White*, [1896] A. C. 187. See, at p. 198, *per* Lord Davey, who reviews the cases. See Wms. R. P. 538.

redeem (*h*). The doctrine is thus clearly and fully stated by Cotton, L.J. (*i*) :—

"The rule as to consolidation of mortgages in its simplest form is this, that where one person has vested in himself by way of mortgage two estates, the property of the same mortgagor, one of these cannot be redeemed without the other; and this is so whether the two mortgages were originally granted to the same mortgagee, or, having been originally vested in different persons, have by assignment become vested in the same person. This was on the equitable principle that a Court of Equity would not assist a mortgagor in getting back one of his estates, unless he paid all that was due, though secured on a different estate. The mortgagor was coming into a Court of Equity to obtain its assistance in getting back an estate which at law belonged to the mortgagee, and it was held to be inequitable to allow him to get back an estate of more value than the debt charged on it, and to leave the mortgagee with an estate charged with a debt due by the mortgagor which might be of larger amount than the value of the estate. But even the rule in this its simplest form was doubted by Lord Hardwicke in the year 1750, as appears by the report of *Ex parte King* (1 Atk. 300), though he afterwards recognised and adopted it. Moreover, as a mortgagor cannot be allowed to prejudice the rights of his mortgagee by any dealings with the equity of redemption of the estate in mortgage, it has been held that a purchaser or mortgagee of one of two estates already in mortgage is, as regards the consolidation of the mortgages, in the same position as the original mortgagor—that is to say, the purchaser of an equity takes subject to all the equities affecting the person through whom he claims. It is in this case contended that this will apply, even though one of the mortgages which it is sought to consolidate was not created till after the mortgagor had sold the equity of redemption of the estate owned by the person claiming to redeem. In our opinion, independently of authority, this contention cannot prevail. It seeks to affect in equity, and by virtue of a rule the creation of equity, the right of a purchaser by the subsequent act of his vendor. That this will be the result will appear from considering from what acts of the purchaser the right of consolidation arises. It is the circumstance of the mortgagor having created two mortgages on two different estates which gives the mortgagee of either estate, as soon as the second mortgage is created, a right to get both the mortgages into his hands, and to hold both till the debt due on each is paid. The principle which allows, as against a subsequent purchaser or mortgagee, the right of consolidation is, that the mortgagor cannot, by any dealing with the equity of redemption, prejudice the rights of his mortgagee. This can

(*h*) *Mills* v. *Jennings*, 13 Ch. Div. 639, S. C., sub nom., *Jennings* v. *Jordan*, affirmed by H. of L., 6 App. Cas. 698, overruling *Tassell* v. *Smith*, 2 De G. & J. 713: and see *Harter* v. *Colman*, 19 Ch. Div. 630, in which case it was held that there was no right of consolidation where two mortgages became united in one person for the first time after the mortgagor has assigned the equity of redemption in one of them; for the assignee takes subject only to equities subsisting at the date of the assignment.

(*i*) *Mills* v. *Jennings*, 13 Ch. Div. 639, at p. 646.

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only apply to rights already given or arising from acts already done by the mortgagor. The same principle will prevent the mortgagor from throwing a greater burden on the purchaser of his equity of redemption by any act done subsequently to the sale or mortgage of this estate. It is true that a mortgagee of one estate may get in and consolidate the mortgage on another estate against a purchaser of the equity of redemption of one of the estates, even though at the time of the purchase the two mortgages were vested in different persons, provided both the mortgages existed previously to the sale of the equity of redemption of one of the estates. But this equity arises out of acts done by the vendor of the equity of redemption previously to the sale; and the act after the sale necessary to give effect to the right of consolidation—namely, the union of the mortgages on both estates in one person—is an act of persons who are no parties to the sale of the equity of redemption, and not bound to the purchaser by any contract inconsistent with the claim to consolidate. In our opinion the purchaser of an equity of redemption takes subject to such equities as arise from acts previously done by his vendor. He is subject to these equities, though acts of persons other than the vendor may be necessary to give rise to the equity. But in our opinion he is not subject to any equity arising from acts done by his vendor subsequently to the sale, and therefore as against a purchaser of an equity of redemption of an estate, there can be no consolidation of a mortgage subsequently created on another estate."

When right of consolidation arises.

It has been recently held that the doctrine does not apply unless default has been made on all the securities in respect of which it is claimed (*k*). Cotton, L.J., says:—

"In order to enable the mortgagee to bring an action, and to consolidate, there must be two debts due, there must be two estates in respect of which there is only an equitable right in the debtor to redeem or claim them back; and that cannot apply to a case where, as regards one of the securities, there has been no forfeiture at all, where the debt is not due, and where, as regards that estate and that security—an independent security—steps could not be taken as against the owner of the equity of redemption to bring him into Court, and to call upon him to redeem or to be foreclosed. It cannot apply to a case where the stipulation is that certain monthly payments are to be made, and there has been no default, and the contract goes on to say that if those payments are all made, then the estate shall revest, there having been no forfeiture so as to make the right of the owner of the estate subject to the security an equitable one only, not depending upon legal contract."

"The principle of the doctrine," it has been said (*l*), "is that a person who comes into equity must do equity;" and if the mortgagor comes to redeem within the time limited by the deed for payment, *i.e.*, while he has still a *legal* right to redeem, the

(*k*) *Cummins* v. *Fletcher*, 14 Ch. Div. 699. And see 2 Dav. Prec. ii. 290.

(*l*) *Per* Lindley, J., *Chesworth* v. *Hunt*, 5 C. P. D., at p. 271.

equitable doctrine has no application; but if he has allowed that time to pass and has no legal rights, then the equitable doctrine applies (*m*).

In order to maintain a right to consolidate, the mortgagee must be able on redemption to reconvey both properties: and therefore there can be no consolidation where one property has ceased to exist (*n*).

Notice immaterial.

It will be remembered that notice of mesne incumbrances is fatal to tacking; but it has been held that as regards the right of consolidation the notice of a subsequent incumbrance is immaterial (*o*).

The Conveyancing and Law of Property Act, 1881 (*p*), provides that where the mortgages, or one of them, are or is made after the 31st December, 1881, a mortgagor (*q*) seeking to redeem any one mortgage shall be entitled to do so, without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem. But this enactment applies only if, and so far as, a contrary intention is not expressed in the mortgage deeds or one of them. So that in future, in respect of mortgages made after the commencement of the above Act, *i.e.*, 31st December, 1881, the right to consolidation can only arise under express contract.

Mortgage by deposit of deeds.

Notwithstanding the Statute of Frauds, which requires an agreement relating to lands to be in writing (*r*), a mere deposit of deeds without any writing, as a security for a loan, may operate as an equitable mortgage in respect of the lands comprised in the deeds; on the principle that such deposit is evidence of an agreement to make a mortgage (*s*); but it is in all cases a question of the intention of the parties.

It was formerly held that where an equitable mortgage was

(*m*) *Per* Lindley, J., *Chesworth* v. *Hunt*, 5 C. P. D., at p. 271.

(*n*) *In re Raggett*, 16 Ch. Div. 117, where there were two mortgages of leaseholds, and the lessors afterwards re-entered on one of the properties for a forfeiture upon the bankruptcy of the mortgagors.

(*o*) *Vint* v. *Padget*, 2 De G. & J. 613.

(*p*) 44 & 45 Vict. c. 41, s. 17.

(*q*) "Mortgagor" includes any person from time to time deriving title under the original mortgagor, or entitled to redeem a mortgage, according to his estate, interest, or right in the mortgaged property (44 & 45 Vict. c. 41, s. 2 (vi.)).

(*r*) 29 Car. II. c. 3, s. 4.

(*s*) *Ex parte Haigh*, 11 Ves. 403. For examples, see Coote, vol. i., p. 342. Also see 2 Dav. Prec. i. 105 (*c*); 2 Spence, 780; notes to *Russel* v. *Russel*, 1 W. & T. 773; and *Ex parte Broderick*, 18 Q. B. D. 380, 766.

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created by deposit of deeds simply, the remedy was by foreclosure (*t*); but that where the deposit was accompanied with a memorandum whereby the depositor agreed to "execute a good and effectual mortgage," the equitable mortgagee was held entitled to foreclosure or sale, and a sale was ordered under the Chancery Procedure Act, 1852 (*u*). Now under the provisions of the Conveyancing and Law of Property Act, 1881 (*x*), the High Court can direct a sale in either case, for it can do so in any action, whether for foreclosure or for sale, or for the raising and payment in any manner of the mortgage money (*y*).

Mortgages of leaseholds.

In mortgages of leaseholds, in order to save the mortgagee from the liability which he would incur in respect of the rent and covenants as assignee of the lease, the mortgage is sometimes made by demise, and thereby the mortgagee becomes tenant of the mortgagor and not of the lessor. The mortgage deed contains a demise of the property to the mortgagee, his executors, administrators, and assigns, for the residue of the term, except the last day or last few days thereof, subject to redemption; and a declaration of trust for the mortgagee of the last day (or last few days) of the term, with power to appoint a new trustee of the nominal reversion (*z*).

The Conveyancing and Law of Property Act, 1881 (*a*), enacts that, in a conveyance by way of mortgage, absolute covenants (for right to convey, for quiet enjoyment, for freedom from incumbrances, and for further assurance) by the person who conveys and is expressed to convey "as beneficial owner" shall be implied, and also a further covenant to pay, observe, and perform all the rents reserved by, and all the covenants, conditions, and agreements in the lease on the part of the lessee to be paid, observed, and performed, and to keep the mortgagee indemnified against all claims by reason of their non-payment, or non-observance, or non-performance (*b*).

(*t*) *James* v. *James*, L. R. 16 Eq. 153, and *Backhouse* v. *Charlton*, 8 Ch. Div. 444; *Re Owen*, [1894] 3 Ch. 220, at p. 227.

(*u*) 15 & 16 Vict. c. 86, s. 48; *York Union Banking Co.* v. *Artley*, 11 Ch. Div. 205. As to the proper form of the foreclosure order, see *Lees* v. *Fisher*, 22 Ch. Div. 283.

(*x*) 44 & 45 Vict. c. 41, s. 25; repealing (*ib.* (6) and 2nd Sched., Part II.) the 48th section of 15 & 16 Vict. c. 86.

(*y*) *Oldham* v. *Stringer*, W. N., 1884, p. 235; S. C. 33 W. R. 251.

(*z*) See 2 K. & E. 31.

(*a*) 44 & 45 Vict. c. 41; s. 7 (1), C. and D. See Appendix, *post*.

(*b*) For forms of mortgages of leaseholds, see 2 K. & E. 76; Stud. Prec. 60.

CHAPTER VIII.

ESTATES IN POSSESSION.—ESTATES IN EXPECTANCY.

In this Chapter we consider the distinction between Estates in Possession and Estates in Expectancy.

An Estate in Possession is one conferring an immediate right to present enjoyment. An Estate in Expectancy is one conferring a right to enjoyment at a future time.

"Possession" is here used as meaning either the actual occupation of lands by the owner himself (*a*), or the receipt (sometimes called the "pernancy") of the rents and profits by him from occupying tenants for years (*b*). Where a person has a right to the immediate possession, but possession is wrongfully withheld from him, he may be regarded for most purposes as having still an estate in possession, though he may be obliged to have recourse to legal process in order to recover the actual possession of the lands (*c*). Strictly speaking, however, he has not seisin (even seisin in law) but only a right of entry (*d*); for the seisin is in the wrongful possessor, who becomes wrongfully entitled to an estate in fee simple (*e*).

I. Estates in possession.

An Estate in Possession requires little comment; it almost explains itself. Thus, if A., being an owner in fee simple in possession, grants the land to B. and his heirs, or to B. for life, B. acquires an estate in possession, in fee in the one case, and for life in the other. So, if he do the like by his will, with no intermediate gift to any other person, B., upon the death of the testator, would acquire an estate in possession.

II. Estates in expectancy.

Estates in Expectancy may be classified as—(1) estates in

(*a*) Lands in the actual occupation of the owner himself are commonly said to be "in hand;" see Elph. N. & C. Interp. (Glossary, s.v. *Demesne*), p. 570.

(*b*) See Co. Litt. 17 a. Where A., being owner in fee simple, has demised to B. for a term of years, A. is properly described, not as having a reversion expectant on the term, but as "seised in fee simple subject to" the term.

(*c*) As to the meaning of "possession" see Pollock and Wright on Possession in the Common Law; Lightwood on Possession of Land, Chs. I. and II.

(*d*) Challis, R. P. 208.

(*e*) Williams on Seisin, p. 6, cited by

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Reversion; (2) estates in Remainder; and (3) Executory Interests, which are created by (a) Executory devises in wills, or (b), "Springing" or "Shifting uses" in deeds. Executory devises and springing and shifting uses will be more easily explained after we have discussed the Statute of Uses; and this part of our subject is therefore reserved for a subsequent Chapter (*f*). It should, however, be here observed that an Executory Interest is, strictly speaking, not an "estate," but a right (which may be contingent) to have an estate at a future time.

Estates in reversion. Definition.

Coke says (*g*):—

> "A reversion is where the residue of the estate always doth continue in him that made the particular estate, or where the particular estate is derived out of his estate."

"Particular estate."

Thus where the owner of an estate of freehold creates a smaller estate of freehold, or creates a term of years and the lessee enters so as to acquire an estate, the part of the freeholder's estate which is not parted with is called a reversion; and the estate created, if a freehold, is called a "particular (*h*) estate." For example: if A., seised in fee simple, grants an estate for life or in tail to B., B.'s estate is a "particular" estate, and that part of A.'s estate in fee simple which is left in him and which will not take effect in possession till the determination of B.'s estate, is called a reversion.

In like manner, if a termor creates by sub-lease out of his own term a term smaller than his own term, and the sub-lessee perfects his sub-lease by entry, the interest which remains in the termor in right of his superior term is called a reversion.

In all these cases the reversion is vested in him by whom the particular estate, or the term of years, was created, without the necessity of stating that it is reserved to him; it is an estate vested in interest, *i.e.*, the owner has a present right of property in the land, though the enjoyment of possession of the land is postponed till the determination of the particular estate, or the term of years.

There is an important distinction as to seisin between the case

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James, L.J., in *Leach* v. *Jay*, 9 Ch. Div. 42.

(*f*) *Post*, Ch. X., p. 282.

(*g*) Co. Litt. 22 b.

(*h*) From the Latin *particula*. "At the Common law, two particular estates only could be created by the act of the party, an estate for life, and an estate for years; the Statute *De Donis* authorized him to create an estate tail; so the law has continued;" Fearne, C. R., p. 3, note (*c*).

where an immediate freeholder creates a particular estate, and the case where he creates a term of years. Where he creates a particular estate, whether for life or in tail, the holder of that estate has actual seisin (*i*); and the person who creates this estate parts with the seisin (*k*). On the other hand, where the immediate freeholder creates a term of years, perfected by entry of the lessee, although the interest retained by the freeholder is reversionary, inasmuch as his right to the possession is postponed, still he remains seised of the immediate freehold (*l*).

Thus, to take the ordinary case of a lease for years at a rent, the landlord having demised for the term of the lease, the right to the actual possession of the lands is no doubt postponed to the expiration of the lease, and the interest of the lessor is so far reversionary. But the right to the rent becomes annexed to the ownership of the reversion; and the receipt of the rent is in fact only a mode of enjoyment by the reversioner of the present profits of the land.

Dower and curtesy.

The effect of this doctrine may be seen in reference to dower and curtesy, for it will be remembered that both these rights attach only on lands of which there is seisin during the coverture (*m*). Where the particular estate is a term of years, the owner of the reversion in fee remains seised of an estate of inheritance; and, therefore, if the reversioner be a man, his wife is dowable thereout; and if the reversioner be a woman, her husband may become tenant by the curtesy (*n*).

Alienation.

The owner of an estate of freehold subject to a term of years, can, with the consent of the tenant for years, convey his estate by feoffment (*o*), which derives its efficacy from the livery of seisin by the feoffor to the feoffee. On the other hand, where a man is seised of a reversion expectant on a particular estate, the seisin being in the owner of the particular estate, the

(*i*) Co. Litt. 17 a, 200 b, 201 a.

(*k*) Notwithstanding that the owner of a reversion expectant on a particular estate has no seisin, we often speak of him as being seised of the reversion; but here the word "seised" is used in a secondary meaning, not as implying possession but as implying a right of property.

(*l*) Challis, R. P. 70, 89; 1 Cruise, Dig. 224, ss. 10, 11, citing Bracton, who remarks that in such a case "*bene scse compatiuntur de eadem re duæ possessiones.*" It is incorrect to speak of a reversion (or a remainder) as being "expectant on a term of years," the proper phrase is that "A. is seised of Blackacre subject to a term of 99 years, &c."

(*m*) *Ante*, pp. 136, 142.

(*n*) Co. Litt. 29 b, 32 a.

(*o*) Co. Litt. 49 a; Wms. R. P. 309. See, as to feoffments, *post*, Ch. XIV., p. 364.

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reversion is an incorporeal hereditament of which no livery can be made; and, therefore, the mode of conveying a reversion in such cases was always by grant. This difference is not now, for practical purposes, very material; for the Real Property Act, 1845 (*p*), provides that all corporeal tenements and hereditaments shall, as regards the immediate freehold thereof, be deemed to lie in grant as well as in livery. An estate in possession and an estate in reversion in the same land can exist as separate estates only so long as they belong to different owners, or, if the same person is owner of both, so long as some estate exists intermediate between the estate in possession and that in reversion. As respects all other estates than an estate tail, the union of the reversionary estate with that in possession causes a merger, and the latter becomes extinguished in the former (*q*). Thus, where the estate in possession, whether for a term of years or for life, has been granted to a man who subsequently acquires the reversion, the larger ownership of the reversion swallows up the smaller estate, which accordingly is annihilated. So, if the owner of an estate in fee simple grants an estate to his eldest son for his life, leaving the reversion in himself, and then dies intestate, whereupon the reversion descends upon the son, the estate for life merges in the reversion. Again, if the lessee for a term of years, acquires the first estate of freehold, the term merges in it. It must, however, be noticed that merger will not take place where the estates meet in the same party in different rights. Thus, in the case of a term, if it belong to a person in the character of executor of its former owner, while the fee belongs to him in his own right, there would be no merger (*r*).

Merger.

No merge of estate tail.

The only estate of freehold which can merge is an estate for life. An estate tail does not merge in a remainder in tail nor in the remainder or reversion in fee: for estates tail are protected from merger by the construction which has been put on the Statute *De Donis*, enacting that the will of the donor is to be fulfilled, which, it was assumed, could not be if the estate tail were thus destroyed. Blackstone says (*s*):—

(*p*) 8 & 9 Vict. c. 106. See *ante*, p. 86.

(*q*) As to merger, see *ante*, p. 162, and the definition of merger given at p. 163, note (*r*).

(*r*) See Challis, R. P. 82; Co. Litt. 338 b; 6 Cruise, Dig 479, s. 51. And *ib.*, title *Merger*, pp. 466, *et seq.*, as to other requisites to produce merger.

(*s*) Vol. ii. 177; and see 6 Cruise, Dig. 481, ss. 61; foll.; Challis, R. P. 83.

"Estates tail are protected and preserved from merger by the operation and construction, though not by the express words, of the Statute *De Donis:* which operation and construction have probably arisen upon this consideration; that, in the common cases of merger of estates for life or years by uniting with the inheritance, the particular tenant hath the sole interest in them, and hath full power at any time to defeat, destroy, or surrender them to him that hath the reversion; therefore, when such an estate unites with the reversion in fee, the law considers it in the light of a virtual surrender of the inferior estate. But, in an estate tail, the case is otherwise: the tenant for a long time had no power at all over it, so as to bar or destroy it: and now can only do it by certain special modes, by a fine, a recovery, and the like: it would, therefore, have been strangely improvident, to have permitted the tenant in tail, by purchasing the reversion in fee, to merge his particular estate, and defeat the inheritance of his issue: and hence it has become a maxim, that a tenancy in tail, which cannot be surrendered, cannot also be merged in the fee."

Incidents to reversion. Fealty. Rent.

From ancient times two incidents have been considered as annexed to a reversion,—"fealty," and, when reserved, rent called a "rent service" (*t*). The former has now become obsolete; but the latter sometimes exists; and whenever rent is reserved to the reversioner on the granting of a particular estate, the right to the rent, unless specially excepted, passes with a grant of the reversion itself. Thus, suppose A. to be the owner in reversion subject to a lease granted out of his estate, his reversion being the next estate immediately expectant on the lease itself; if he grant over to another the reversion, the right to the rent passes, with the estate itself, to the grantee. The rent is called "rent service," as it is the service rendered by the tenant to his lord (*u*); it usually, but not necessarily (*x*), consists of money, and sometimes it is a peppercorn merely (*y*).

At Common law an estate of freehold could be created by feoffment (*z*), and a term of years could be created by parol (*a*),

(*t*) "Rent service is where the tenant holdeth his land of his lord by fealty and certain rent, or by homage fealty and certain rent, or by other services and certain rent;" Litt. s. 213. That it must be certain, see Co. Litt. 142 a. See as to rent service, Leake, Us. & Prof. 372, *et seq.*; Burton, Comp. 333.

(*u*) "It is called rent service because it is accompanied with some corporal service, as fealty at the least;" Co. Litt. 87 b.

(*x*) 3 Cruise, Dig. 272; Gilbert on Rents, 9; Smith, L. & T. 119.

(*y*) 2 Bl. 41. See form of reservation of a peppercorn rent in 1 K. & E. 677. It is often employed in building leases in respect of the period during which the buildings are likely to be in course of erection: see Settled Land Act, 1882, s. 8 (2), which authorizes such a reservation, in building leases granted under the Act, "for the first five years or any less part of the term."

(*z*) See *ante*, p. 21.

(*a*) See *ante*, p. 151.

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and in either case there might be a reservation of rent; but at the present day an estate of freehold or a term of years (other than a term within the exception contained in the Statute of Frauds) (*b*) can only be created by deed; and therefore the reservation of rent must, unless in the excepted case, be made by deed.

Though rent be incident to the reversion when existing, its creation is not a condition to the creation of the reversion itself. An estate for years, for life, or in tail, may be created without any reservation of rent at all. The estate would be good, and the reversionary interest as much preserved as though rent had been reserved. Lord Coke says (*c*) :—

> "It is to be understood that in the case of a gift in tail, lease for life or years, the fealty is an incident inseparable to the reversion, so as the donor or lessor cannot grant the reversion over, and save to himself the fealty, or such like service. But the rent he may except, because the rent, although it be incident to the reversion, yet it is not inseparably incident. If a man maketh a gift in tail without any reservation, the donee shall hold of the donor by the same services that he held over. But otherwise it is of an estate for life or years; for there, if he reserveth nothing, he shall have fealty only, which is an incident inseparable to the reversion, as hath been said."

Attornment.

At Common law, no grant could be made of the reversion carrying with it the right to the rent, without the consent of the tenant, expressed by what was called "attornment" to his new landlord. It was conceived unreasonable to impose a new landlord upon the tenant without his concurrence. Such at least was the case when the grant was made by an assurance of the ordinary character; though it was otherwise when it was effected by a fine, which, being treated as a judicial assurance, superseded the necessity for attornment. A statute of the reign of Queen Anne abolished the necessity for attornment (*d*); and by the Distress for Rent Act, 1737 (*e*), any attornment made by tenants without their landlord's consent to strangers, claiming title to the estate of their landlords, is made null and void.

Distress.

Rent service issues out of every part of the land; in other words, every portion of the property is liable to it; and for recovery of all rent service there exists at Common law (*f*) the

(*b*) 29 Car. II. c. 3. *Ante*, p. 151.
(*c*) Co. Litt. 143 a.
(*d*) 4 Anne, c. 16, s. 9. See, as to attornment, *Moss* v. *Gallimore*, 1 Sm. L. C.; and *ante*, p. 170.
(*e*) 11 Geo. II. c. 19, s. 11.
(*f*) Litt. s. 213.

remedy called "distress," which is a right of seizure of chattels (*g*) found on any part of the premises. By statute, power has been given to a landlord to sell goods distrained (*h*) and to distrain goods fraudulently removed (*i*). By the Lodgers' Goods Protection Act, 1871 (*k*), the goods of lodgers are protected.

Condition of re-entry.

Ordinary leases usually contain an express condition of re-entry on non-payment of the rent (*l*).

The assignee of the reversion at Common law had a right to distrain for rent, because the rent was incident to the reversion; but he could not avail himself of conditions of entry (*m*). They were treated as personal only to the landlord and his heirs. A statute of Henry VIII. (*n*), however, in the case of leases by deed (*o*), made them transferable. The Wills Act, 1837 (*p*), enabled rights of entry for conditions broken to be disposed of by will, and the Real Property Act, 1845 (*q*), enabled all rights of entry to be disposed of by deed.

We have above (p. 171) pointed out the consequences which formerly ensued wherever the immediate reversion on a lease was destroyed, and we have referred to the remedy provided by the Real Property Act, 1845 (*r*).

(*g*) See as to what things can be distrained, Co. Litt. 47 a, and note (*k*) *infra*. And as to distress for rent generally, Leake, Us. & Prof. 422, *et seq.*

(*h*) 2 Will. & Mary, c. 5, s. 2 (2 Will. & Mary, Sess. 1, in Ruffhead).

(*i*) 8 Anne, c. 14: repealed, see now 11 Geo. II. c. 19, and *Gray* v. *Stait*, 11 Q. B. D. 668.

(*k*) 34 & 35 Vict. c. 79. See *Phillips* v. *Henson*, 3 C. P. D. 26; *Thwaites* v. *Wilding*, 12 Q. B. D. 4; and *Heawood* v. *Bone*, 13 Q. B. D. 179; Smith, L. & T. 224. And see the Law of Distress Amendment Act, 1888 (51 & 52 Vict. c. 21; amended by 58 & 59 Vict. c. 24), exempting from distress for rent certain goods and chattels of the tenant and his family, viz., those which would be protected from seizure in execution under s. 147 of the County Courts Act, 1888 (51 & 52 Vict. c. 43), which are "the wearing apparel and bedding of such person or his family and the tools and implements of his trade to the value of £5." See as to the various classes of things privileged from distress, Foa, L. & T., pp. 382, *et seq.* As to the restrictions on the right of distress in the case of agricultural holdings, see the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), ss. 44–48; *Ex parte Bull*, 18 Q. B. D. 642.

(*l*) *Ante*, p. 172; Elph. Introd., p. 230.

(*m*) *Scaltock* v. *Harston*, 1 C. P. D. 106; see *per* Archibald, J., p. 109; and *ante*, p. 193.

(*n*) 32 Hen. VIII. c. 34.

(*o*) *Standen* v. *Christmas*, 10 Q. B. 135. *Ante*, p. 170.

(*p*) 7 Will. IV. & 1 Vict. c. 26, s. 3.

(*q*) 8 & 9 Vict. c. 106, s. 6.

(*r*) 8 & 9 Vict. c. 106, s. 9. Observe that this section applies only to cases of extinguishment of the lease by surrender or merger. But it appears not to apply to cases of disclaimer of a lease by the trustee in bankruptcy of the lessee under s. 55 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52). See *Ex parte Walton*, 17 Ch. Div. 746; *East and West India Dock Co.* v. *Hill*, 9 App. Cas. 448. As to disclaimer in bankruptcy, see Dav. Conc. Prec. 158,

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Estates in remainder (*s*). How different from reversions.

A "remainder" resembles a reversion in that it is an estate conferring a right to possession at a future time, viz., after the expiration of a particular estate; but it differs from a reversion, first, in respect of the mode in which it comes into existence; and secondly, in the matter of tenure.

Coke defines a remainder as—

"A residue of an estate in land depending upon a particular estate and created together with the same" (*t*).

And again, as

"A remainder or a remnant of an estate in lands or tenements, expectant upon a particular estate, created together with the same at one time" (*u*).

Here by "the particular estate" is meant the first estate limited which confers the right to the immediate possession. But subsequent particular estates, *i.e.*, estates less than the fee simple, may be at the same time limited; and these subsequent particular estates will be remainders; for any estate limited to take effect in possession after the determination of another estate (according to the limitation of that estate as distinguished from its determination by a condition (*x*)) is a remainder (*y*).

A remainder differs from a reversion in that it arises by the act of the party who creates the particular estate, and is neces-

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note (*b*); and Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 13.

(*s*) See 6 L. Q. R. 22

(*t*) Co. Litt. 49 a.

(*u*) Co. Litt. 143 a.

(*x*) *Ante*, p. 191; Fearne, C. R. 261.

(*y*) "*Remainder* and *reversion* are both relative terms, each depending upon the relation of an estate which is posterior in point of time to an estate which is prior in point of time. The prior estate is in both cases styled the *particular* estate. The distinction between a remainder and a reversion lies in the difference in the relation borne by them respectively to the particular estate; and this relation depends upon the circumstances under which the particular estate became separated from the reversion or remainder. A remainder is constituted by the act, expressly directed to that end, of a grantor or settlor, who simultaneously derives two (or more) estates out of his own estate and limits them to different persons by way of succession, in such a way that the estates may successively become the estate in possession, each of them (except the first in order) giving a *present title* to the *future possession*. Of two estates so created, that which is posterior subsists as a remainder in expectancy upon that which is prior in the order of time and of limitation. A reversion, without any express act of the grantor or settlor, is left in him by the operation or construction of law, when he merely parts with less than his whole estate, retaining in himself a residue which awaits the determination of that with which he has parted, before it can become the estate in possession;" Challis, R. P. 67. See the remarks of Mr. Fearne (C. R., p. 3, note (*c*) on Coke's definition of a remainder.

sarily an estate created in favour of a stranger, while a reversion arises by operation of law in consequence of the creation of a particular estate or a term of years, and is that part of the original estate of the grantor which is retained by him. It follows that a remainder must, as Coke points out, be created together with the particular estate and at the same time.

An estate in Remainder is defined by Blackstone (*z*) to be—

"An estate limited to take effect and be enjoyed after another estate is determined. As if a man seised in fee simple granted lands to A. for twenty years, and after the determination of the said term, then to B. and his heirs for ever: here A. is tenant for years, remainder to B. in fee. In the first place an estate for years is created or carved out of the fee, and given to A.: and the residue or remainder of it is given to B. But both these interests are in fact only one estate; the present term of years, and the remainder afterwards, when added together, being equal only to one estate in fee. They are, indeed, different parts, but they constitute only one whole; they are carved out of one and the same inheritance: they are both created, and may both subsist together; the one in possession, the other in expectancy. So if land be granted to A. for twenty years, and, after the determination of the said term, to B. for life; and, after the determination of B.'s estate for life, it be limited to C. and his heirs for ever: this makes A. tenant for years, with remainder to B. for life, remainder over to C. in fee. Now here the estate of inheritance undergoes a division into three portions: there is, first, A.'s estate for years carved out of it: and after that, B.'s estate for life, and then the whole that remains is limited to C. and his heirs. And here also the first estate, and both the remainders, for life and in fee, are one estate only; being nothing but parts or portions of one entire inheritance: and if there were a hundred remainders, it would still be the same thing; upon a principle grounded on mathematical truth, that all the parts are equal, and no more than equal, to the whole. And hence, also, it is easy to collect, that no remainder can be limited after the grant of an estate in fee simple: because a fee simple is the highest and largest estate that a subject is capable of enjoying; and he that is tenant in fee hath in him the whole of the estate: a remainder, therefore, which is only a portion, or residuary part, of the estate, cannot be reserved after the whole is disposed of. A particular estate, with all the remainders expectant thereon, is only one fee simple; as £40 is part of £100, and £60 is the remainder of it: wherefore, after a fee simple once vested, there can no more be a remainder limited thereon than after the whole £100 is appropriated there can be any residue subsisting."

No remainder after fee simple (*a*).

In the case of a reversion, a tenure exists between the owner of the particular estate and the reversioner; the former owes fealty to, and may have to pay rent to the latter. In the case of a remainder, however, no such tenure exists (*b*). If an estate be

No tenure between tenant for life and remainderman.

(*z*) Vol. ii. 164.

(*a*) As to alternative limitations in fee, see *post*, pp. 242, 243.

(*b*) Co. Litt. 142 b; Challis, R. P. 22.

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limited to A. for his life, with remainder to B. in fee, A. does not hold of B. any more than B. of A. Both A. and B. derive their estates from the same source: viz., the grant of the former owner in fee simple, to whose ownership they have succeeded; and the one has no more right to be lord than the other; but both A. and B. hold of the lord of whom the person who conveyed to them held; and where the power of tracing the mesne lord has been lost by lapse of time, the land is considered to be held of the Crown as lord. In the case, accordingly, of every grant of a particular estate, with remainder in fee simple, the two estates, though belonging to different persons, are both, in legal theory, held of the same lord.

Right to enter immediately on cesser of prior interest.

Where a series of estates is created in remainder each estate in the series has to wait for the determination (*c*) of all the preceding estates, and the possession of the lands cannot be enjoyed by its owner until such determination. The moment, however, that all the prior estates have ceased to exist, or have determined, from whatever cause the cesser or determination takes place, the right to the possession or enjoyment of the rents and profits of the lands devolves on the person entitled to the succeeding estate. Thus, where A. has an estate for his life, with remainder to B. in fee, if A. incur a forfeiture of his estate, B. has a right of entry; in other words, B. has a right to the seisin without waiting for A.'s death.

Freehold estate *in futuro*.

The ancient Common law insisted upon two principles: first, that the tenancy should never be vacant, or should be always, as it was termed, "full," in order that there might be always a person, namely, the tenant, seised of the land, to render the services due in respect of the tenancy; and secondly, that the creation of a freehold interest could only be effected by the open transfer of the property—either by a feoffment, which involved the public delivery of possession, or, as it was termed, "livery of seisin," or by a proceeding in open Court, *i.e.*, by fine or recovery. Down to the time at which, as we shall hereafter see, a new method of creating estates was introduced by the doctrine of Uses, no future estate could be limited except by way of remainder upon a particular estate.

(*c*) Where an estate is limited so as to determine a prior estate it cannot be a remainder, but is an executory interest, see *post*, p. 282; *Blackman* v. *Fysh*, [1892] 3 Ch. 209.

By any attempt to create a freehold estate to take effect at a future period, with no intermediate limitation of the freehold, both these principles would have been infringed. If A., seised in fee, could have made a feoffment to B. (or to B. and his heirs) from a future day, A. would have parted with, and divested himself of his estate, but B.'s estate being to take effect only *in futuro*, there would have been in the meantime no one liable as tenant to perform the services. But in order to divest himself of his estate, A. must have made livery of seisin; and this in its nature must operate immediately or not at all. A particular estate of freehold might, however, be created by livery of seisin, to take effect immediately, followed by an estate to take effect by way of remainder, immediately on the termination of the particular estate. The remainder would take effect on the expiration of the particular estate, and the particular estate was said to be a prop or support on which the remainder might lean. But future estates can be made of chattel interests (*d*), which were considered in the light of mere contracts by the ancient law, to be executed either now or hereafter, as the contracting parties should agree.

But not only may there be distinct estates carved out of the same ownership in favour of different persons, but the same person may be possessed of two different estates in the same land; as where lands are limited to A. for life, with remainder to B. in tail, with remainder to A. and his heirs. Here A. has a particular estate for life in possession and also a remainder in fee simple expectant on the determination of the estate tail of B.

Rule in *Shelley's Case*.

Limitations of estates of inheritance to the heirs of a person, who *under the same instrument* takes a prior estate of freehold, are subject to the operation of a rule of law known as "the rule in *Shelley's Case*," from a case in the time of Queen Elizabeth reported by Coke (*e*), in which it was much discussed; but the rule existed long before the date of that case (*f*).

The rule in *Shelley's Case* may be described in the words of a learned writer (*g*), as referring to "the statement of the circum-

(*d*) Bl. ii. 165.

(*e*) 1 Rep. 93 b. The case itself is intricate and not easily to be understood by beginners. The advanced student will find it admirably stated and expounded in Challis, R. P. 141. It is printed with notes in Tudor, L. C. R. P. 589; and see Burton, Comp. 118 (339), *et seq.*

(*f*) The earliest known case in which the rule was applied is *Abel's Case*, Y. B. 18 Ed. 2, fol. 577 (translated in 7 Man. & Gr. 941, note).

(*g*) Challis, R. P. 141.

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stances under which verbally distinct limitations, contained in the same instrument, one limitation being to a given person and the other being to his heirs, either general or special, will not give any distinct estate to the heir, but will give an estate of inheritance to the ancestor."

The Rule may be stated as follows :—

Where the ancestor takes an estate of freehold (*h*), and, in the same instrument, an estate is limited by way of remainder, either mediately (as to A. for life, remainder to B. for life or in tail, remainder to the heirs of A.) or immediately (as to A. for life with remainder to his heirs) to his heirs, or the heirs of his body, the word "heirs" is a word of limitation and not of purchase; and therefore the ancestor takes an estate in fee simple or in tail as the case may be, and the heir or heir of the body of the ancestor takes no original estate (*i.e.*, no estate primarily vested in himself and not claimed by him derivatively through his ancestor). The remainder is said to be "immediately executed in possession in the ancestor taking the freehold" (*i*). The rule applies where the ancestor, being the grantor, takes a particular estate by implication (*j*).

Limitations must be in same instrument; and both legal or both equitable.

The Rule does not apply where the two limitations are not contained in one and the same instrument; nor where one is legal and the other equitable (*k*); but there is no difference, as to its application, between deeds and wills (*l*).

The rule in *Shelley's Case* is a rule of law, not a rule of construction; and accordingly no language that can be used in the instrument will prevent it from having its effect. No doubt the ordinary rules of construction must be applied to ascertain whether a life estate is given to A., and whether an estate in remainder is limited to his heirs or to the heirs of his body; but, when it appears that this is the case, the rule applies, notwithstanding the strongest expression of intention that it is not to apply. It may happen, however, that, on the true construction of the deed, the word "heirs" is not used in its ordinary meaning; as, for instance, if the limitation is to A. for life, with remainder to his "heirs," which word is shewn by the

(*h*) *I.e.*, an estate for his life or an estate *pur autre vie*.

(*i*) Fearne, C. R. 28.

(*j*) Elph. N. & C. Interp. 287.

(*k*) See Elph. N. & C. Interp. 243, 244; *Richardson* v. *Harrison*, 16 Q. B. D. 85.

(*l*) *Re White and Hindle*, 7 Ch. Div. 201.

context to mean his children. In such a case the rule is inapplicable, not because an intention is expressed that it should not apply, but because the word "heirs" is used as meaning "children," and in a deed "children" is not a word of limitation.

We do not know by what reasoning the rule was originally established; but the following considerations will show that it would be impossible for any person who understood the meaning of the words employed to deny the existence of the rule. Ever since the Conquest, English lawyers were acquainted with the difference between a conveyance "to A." and a conveyance of land "to A. and his heirs." In the first case, A.'s interest determined on his death; in the second case, it passed on his death to his heirs. Then the case arose of a conveyance "to A., with remainder to his heirs." Now what is the meaning of "the heirs of A." (*m*)? It means an indefinite succession of persons, each of whom will succeed to the land of which A. dies seised (or according to the present law of which A. was the purchaser, and dies seised), unless some prior heir alienates it, or, according to the old law, becomes attainted. It is sometimes forgotten that although before the Inheritance Act, 1833 (*n*), heirship was traced from the person last seised, yet every blood relation of the purchaser was necessarily one of his heirs, except where he was excluded by the rule as to the half-blood. It follows therefore that, unless both the purchaser and his father and mother were bastards, the number of persons each of whom might be his heir was infinite: and as there can be only one heir at the same time, each of these persons became the heir in succession one after the other. There was no manner known to the Common law in which these persons could take by purchase. The only estates which could be held by more than one person as purchaser were estates in joint tenancy and tenancy in common. The estate of the heirs could not be in joint tenancy, for the estates of joint tenants must, according to the Common law, arise at the same time and not in succession; it could not be tenancy in common, because, although the estates of tenants in common may arise at different times, still persons cannot be tenants in common unless they are tenants at the same time, which is impossible in the case of heirs. If, therefore, it is not

(*m*) *Evans* v. *Evans*, [1892] 2 Ch. 173; 9 L. Q. R. 2.

(*n*) 3 & 4 Will. IV. c. 106.

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possible for the heirs to take by purchase, the only possible manner in which they can take is by descent; in other words, A. the ancestor must take the fee simple.

Remainders are either Vested or Contingent.

Vested remainder.

A Vested Remainder is one which is necessarily capable of taking effect on the determination of the particular estate on which it is expectant. If an estate is limited to A. for his life with remainder to B. and his heirs; the limitation to B. and his heirs, not being dependent upon any contingency, must necessarily come into operation whenever the estate of A. ends. Though the time of the termination of A.'s estate is uncertain, yet, the instant that A.'s estate determines, whether by death or forfeiture, B.'s estate will certainly take effect in possession. And if the remainder were limited to B. for his life only, instead of in fee, though it is possible that B. may die before A., and that B. may never come into the actual enjoyment of the estate, still there is a right on the part of B. to take if A.'s estate falls in during his life. Where B.'s estate is a fee simple, B.'s heirs or devisees, or persons claiming by conveyance from B., will take on A.'s death, though A. outlive B. In either case the law does not regard the uncertainty, whether B. will be alive to take the benefit of the gift or not, as affecting the question of the remainder itself being vested (*o*). "The person entitled to a vested

(*o*) As to the meaning of the word "vested," Mr. Hawkins (on Wills, p. 221) remarks:—

"The word 'to vest' has several senses, which it is important to distinguish.

"Originally the word had reference only to real estate. As applied to estates in land, 'to vest,' signifies the acquisition of a portion of the actual ownership or feudal possession of the land (*vestire*—seisinam dare—infeodare; Spelman): the acquisition, not of an estate in possession, but of an actual estate. The fee simple being supposed to be carved out into parts or divisions by the creation of particular estates, a grant to any person of one of these portions of the fee vested him with, or vested in him, an estate in the land. Thus 'vested' is nearly equivalent to 'possessed.'

"In this, its original sense, 'vested' has no reference to the absence of conditionalness or contingency. If an estate tail be limited to A., with remainder to B., the estate of B. is a vested remainder, not because the failure of issue of A. is considered an event certain at some time or other to happen, as has been alleged (Smith's View of Executory Interests, sect. 192):—failure of issue of a person is an event altogether contingent:—but because such a remainder vests in B. an actual portion of the fee, though the time of its falling into possession is wholly contingent and uncertain. B. is invested with a portion of the ownership of the land.

"All remainders, not vested, are in fact contingent, not as being necessarily limited on an uncertain event, but because their taking effect depends on the contingency of their happening to vest during the continuance of the particular estate which supports them, and which may determine at any moment. Thus 'vested' comes to

remainder has an immediate fixed right of future enjoyment; that is, an estate *in præsenti*, though it is only to take effect in possession and pernancy of profits at a future period" (*p*).

Contingent remainders.

A contingent remainder is one which will not take effect on the determination of the particular estate on which it is expectant unless some event, which may or may not happen, does happen before, or simultaneously with, such determination. In other words, it is subject to a condition precedent (*q*). It follows that a person entitled to a contingent remainder has no present right of property. His right does not arise until the condition is performed; or, as it is sometimes stated, the estate commences at a future time in interest as well as in possession. If we bear in mind the rule of the Common law that the tenancy must always be full, it will be apparent that, if the condition precedent is not performed during, or at latest at the instant of the determination of, the particular estate, so that the contingent remainderman has not acquired a right of property at latest at the time of such determination, some other person, either a vested remainderman or the reversioner, will at that time have the right both to the property and to the possession; and, as there is no means

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mean the opposite of 'contingent' or conditional. But the word itself refers, as has been said, not to contingency but to possession.

"It is obvious that this division into 'vested' and 'contingent' fails when applied to future executory interests in land, not taking effect as remainders. An executory devise, after a fee simple, cannot be said to be 'vested' as an estate, until it vests in possession; yet it may be limited on an event absolutely certain to happen, and is, therefore, not contingent. When, therefore, Fearne (C. R., Introduction, p. 1) divides 'vested estates' into (1) estates vested in possession, and (2) 'estates vested in interest, as reversions, vested remainders, such executory devises, future uses, conditional limitations, and other future interests as are not referred to or made to depend on a period or event that is uncertain,' he uses the expression 'vested in interest' in a different sense from that which it bears as applied to a remainder. Thus, the word is already losing its original meaning.

"The only definition that can be given of the word 'vested' in English law, as applied to future interests, other than remainders, is, that it means, 'not subject to a condition precedent:' what amounts to a condition precedent, the cases only can determine. As applied to remainders in land, the word retains its original sense, denoting the actual possession of an *estate in* the land." (*I.e.*, as distinguished from actual possession of the land itself.)

Mr. Challis says (R. P. 64):—"An estate is said, though not vested in possession, to be vested in interest in a given person, when that person would be entitled, by virtue of it, to the actual possession of the lands, if the estate should become the estate in possession by the determination of all the preceding estates."

(*p*) 2 Cruise, Dig. 204.

(*q*) "An estate is contingent when a right of enjoyment is to accrue on an event which is dubious and uncertain;" Fearne, C. R., p. 2.

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of taking this possession away from him, the contingent remainder "fails," that is, can never take effect, a consequence which has in most cases been obviated by statute.

The condition precedent may form part of the description of the person who is to take, or it may be the occurrence of a collateral event. In the former case, if the condition is not performed before, or simultaneously with, the termination of the preceding estate, the contingent remainder fails because the person who is to take is not ascertained. For example, where the limitations are "to A. for his life, with remainder to the heir of B. (a living person);" if B. is living at A.'s death, his heir is an unascertained person, for *nemo est heres viventis*, and the remainder fails; but, if B. dies in A.'s lifetime, his heir is an ascertained or ascertainable person, and the remainder becomes vested. An example of a contingent remainder depending on a collateral event is afforded by a limitation "to A. for life, with remainder, if A. marries, to B. and his heirs." Here there is no uncertainty as to the person who is to take, but the uncertainty is whether A. marries; if he does, B.'s remainder becomes vested; if he does not, B. can never take (*r*).

Posthumous child.

Where a life estate is limited to A., with remainder to his first-born child, and A. dies without having had any child born, but a child is born to him after his death, the remainder would, upon a strict application of the rule above stated, fail to take effect: but by 10 & 11 Will. III. c. 22 (*s*), posthumous children are enabled to take estates as if born in their father's lifetime, where the estate is limited in remainder by marriage or other settlement.

Contingency with double aspect.

It follows from the nature of the case that, if all the fractional interests carved out of an estate exhaust the estate, no ulterior limitation can be superadded. It is obvious, therefore, that one estate in fee simple cannot be limited by way of remainder on another, nor, indeed, after a fee simple can any remainder at all be limited (*t*). This, however, does not prevent alternative limitations of several contingent remainders even in fee. Thus

(*r*) According to some opinions, contingent remainders were in ancient times invalid (see Wms. R. P. 331). It seems to have been first determined that if land be leased to A. for life, with remainder to the right heirs of J. S., a living person, the remainder is good. A limitation to the "heirs" of a deceased person, whether in a deed (Elph. N. & C. Interp. 228), or a will (2 Jarman, 906), confers a fee simple on the person who happens to be his heir.

(*s*) So in Revised Statutes: In Ruffhead's ed. it is c. 16.

(*t*) See the extract from Blackstone, *ante*, p. 235.

an estate may be given to A. for his life, and, if he have a son, to that son in fee, but, if he have no son, to a daughter in fee; the latter limitation is not a remainder on, but is substitutionary for the former; and both are remainders on the particular estate. Limitations of this nature are described as contingencies "with a double aspect" (*u*).

Contingent remainder may become vested.

A remainder, contingent in its original limitation, may become vested by subsequent events. Thus, where the limitations are to A. for his life, with remainder to the first son whom B. may have, B. having none at the time, so long as B. has no son born, the remainder is contingent; but as soon as a son is born (in A.'s lifetime), it becomes vested. The happening of the event upon which the remainder is contingent converts it into a vested remainder.

Rules for creation.

From the doctrine of the Common law to which we have referred—that the tenancy must never be vacant, it followed that every contingent remainder of an estate of freehold must have a particular vested estate of freehold to support it. It could not be limited to take effect after a term of years, or at some future time other than the determination of the particular estate; for in such cases there would be a time during which the seisin would be without an owner. The freehold must pass out of the grantor at the time the remainder is created. Now the freehold passed by livery of the seisin, which was a transfer of the immediate possession. Consequently, if the first limitation was for years only, the next limitation could not be a remainder; for, if it were, the freehold would be in abeyance during the term (*x*). Moreover, every estate in expectancy, in order to be valid by way of remainder, must be so limited as to take effect in possession immediately on the determination of the particular estate. It follows that every contingent remainder must vest either during the continuance of the particular estate, or *co instanti* that it determines (*y*).

"Suppose lands to be given to A. for his life, and after his decease to such son of A. as shall first attain the age of twenty-four years. As a contingent remainder, the estate to the son is well created; for the feudal seisin is not necessarily left without an owner after A.'s decease. If, therefore, A. should, at his decease, have a son who should then be twenty-four years of age or more, such son will at once take the feudal

(*u*) *Loddington* v. *Kime*, 1 Salk. 224; Fearne, C. R. 373; Challis, R. P. 71.

(*x*) Fearne, C. R. 281, 307.

(*y*) Challis, R. P. 109.

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possession, by reason of the estate in remainder which vested in him the moment he attained that age. In this case the contingent remainder has vested during the continuance of the particular estate. But if there should be no son, or if the son should not have attained the prescribed age at his father's death, the remainder will fail altogether. For the feudal possession will then, immediately on the father's decease, revert, for want of another owner, to the person who made the gift in right of his reversion. And, having once reverted, it cannot now belong to the son, without the grant to him of some fresh estate by means of some other conveyance" (*z*).

Destruction.

Since every remainder requires a particular estate of freehold for its support, it follows that, if before the contingency happens the particular estate ceases to exist, the remainder fails. Thus, if the particular estate came to its natural termination or was forfeited, surrendered, or merged before the person to take in remainder came into existence, the remainder, which depended on the particular estate for its support, would fail; accordingly, down to a very modern period, all contingent remainders, as regards forfeiture, surrender, or merger, were very much at the mercy of the owner of the particular estate. A remedy, however, was provided for this by the Real Property Act, 1845 (*a*), which enacted that:—

Forfeiture, surrender, or merger of particular estate.

> S. 8. "A contingent remainder existing at any time after the 31st day of December, 1844, shall be, and if created before the passing of this Act shall be deemed to have been, capable of taking effect, notwithstanding the determination by forfeiture, surrender, or merger, of any preceding estate of freehold, in the same manner in all respects as if such determination had not happened."

By "forfeiture" in this section is meant forfeiture at the Common law (*b*). The word "forfeiture" is sometimes, though incorrectly, applied, first, to the cesser of an estate on the performance of a condition, where according to the original limitation of the estate, it is only to last until the condition is performed; as, for example, where land is devised to A. until he does a certain act; and, secondly, to the destruction of an estate by a condition subsequent, where the original limitation of the estate contains no reference to the condition; as, for example, where land is limited to A. during his life, with a proviso that his estate shall cease if he does a certain act. In these cases, if A. does the act, the estate ceases, and A. is popularly said to have "forfeited"

(*z*) Wms. R. P. 338.
(*a*) 8 & 9 Vict. c. 106.
(*b*) *Ante*, p. 113.

the estate. It should be noted that in the first case, where according to the original limitation of the estate it only lasts till the condition is performed, an estate may be limited in remainder on it; but where the estate is liable to be destroyed by a condition subsequent, any estate limited to arise on the destruction of it cannot take effect by way of remainder, though it may take effect as an executory devise or use (*c*).

Natural determination of particular estate.

But, although by the Real Property Act, 1845, contingent remainders were protected against the destruction of the preceding particular estate by forfeiture, surrender, or merger, they were still left liable to destruction by the natural determination of all the preceding particular estates before the happening of the contingency on which the remainder was to vest. This occurred in a case (*d*) where a testator devised real estate to A. and B. and their heirs to the use of A. and B., their executors, administrators, and assigns, for a term of 120 years, if S., the wife of C., should so long live (*e*), and subject thereto, to the use of C. for life with remainder to the use of A. and B. and their heirs during his life upon trust to support contingent remainders, with remainder to the use of all the children of C. and S. who should be living at the death of the survivor of them and the respective heirs and assigns of such children, as tenants in common. C. died in the life of S. It will be observed that the contingent remainder to the children was to vest on the death of the survivor of C. and S., and that the particular estate determined naturally on the death of C. in the lifetime of S., so that the remainder to the children failed for want of an estate of freehold to support it. In consequence of this case, the Contingent Remainders Act, 1877 (*f*) was passed to prevent a similar result in the case of any instrument executed after its passing, viz., 2nd August, 1877. It provides that

40 & 41 Vict. c. 33.

S. 1. "Every contingent remainder created by any instrument executed after the passing of this Act or by any will or codicil revived or republished by any will or codicil executed after that date, in tenements or hereditaments of any tenure, which would have been valid as a springing or shifting use or executory devise or other limitation had it not a sufficient estate to support it as a contingent remainder, shall, in the event of the particular estate

(*c*) *Blackman* v. *Fysh*, [1892] 3 Ch. 209.

(*d*) *Cunliffe* v. *Brancker*, 3 Ch. Div. 393.

(*e*) This estate, as we have pointed out, *ante*, p. 32, is not a freehold.

(*f*) 40 & 41 Vict. c. 33.

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determining before the contingent remainder vests, be capable of taking effect in all respects as if the contingent remainder had originally been created as a springing or shifting use or executory devise or other executory limitation."

The student will not be able to understand the effect of this Act until he has learnt the meanings of "springing" and "shifting uses" and "executory devises" (*g*).

Trustees to preserve contingent remainders.

Limitations to trustees to preserve contingent remainders are explained by a learned author (*h*) as being limitations "from and after the determination of the estate of tenant for life, by forfeiture or otherwise in his lifetime, to some trustees during his life in trust to preserve the contingent remainders expectant on his decease from being destroyed, to which they would otherwise be liable from his surrender, forfeiture, or tortious alienation." Thus, let the limitations be to A., a bachelor, for his life, and after his death, to his eldest son and the heirs of his body, and in default of such issue, to B. and his heirs. In order to preserve the contingent remainder to the son of A., a limitation was formerly introduced in the form above described. On this it has been observed (*i*)—

"An estate for the life of A., to take effect in possession after the determination, by forfeiture or otherwise, of A.'s life interest, is not a contingent, but a vested estate in remainder. It is a present existing estate, always ready, so long as it lasts, to come into possession the moment the prior estate determines. The plan, therefore, adopted for the preservation of contingent remainders to the children of a tenant for life was to give an estate, after the determination by any means of the tenant's life interest, to certain persons and their heirs during his life, as trustees for preserving the contingent remainders; for which purpose they were to enter on the premises, should occasion require, but should such entry be necessary, they were nevertheless to permit the tenant for life to receive the rents and profits during the rest of his life. These trustees were prevented by the Court of Chancery from parting with their estate, or in any way aiding the destruction of the contingent remainders which their estate supported. And, so long as their estate continued, it is evident that there existed, prior to the birth of any son, three vested estates in the land; viz., the estate of A., the tenant for life, the estate in remainder of the trustees during his life, and the tenant in fee simple in remainder, belonging, in the case we have supposed, to B. and his heirs. This vested estate of the trustees, interposed between the estates of A. and B., prevented their union, and consequently prevented the remainder in fee simple from ever coming

(*g*) See *post*, pp. 282, *et seq.*
(*h*) Fearne, C. R. 325; see Challis, R. P. 130.
(*i*) Wms. R. P. 348.

into possession, so long as the estate of the trustees endured, that is, if they were faithful to their trust so long as A. lived. Provision was thus made for the keeping up of the feudal possession until a son was born to take it; and the destruction of the contingent remainder in his favour was accordingly prevented. But now that contingent remainders can no longer be destroyed, of course there will be no occasion for trustees to preserve them."

Equitable estates.

It should be noticed here that the rule of law which required that a contingent remainder should be supported by a particular estate of freehold applied only to legal estates. Where the limitations are equitable, the legal estate is in the trustee and therefore there is no abeyance of the freehold (*k*).

Alienation.

Contingent remainders, so long as they remain in contingency, were formerly regarded as mere possibilities of succession; and, not being interests amounting to what the law regarded as estates, they were not subject to the ordinary modes of alienation to which estates were subject—that is to say, they could not be alienated at law otherwise than by fine or recovery, though they might be assigned in equity (*l*). They are expressly made devisable by the Wills Act, 1837 (*m*); and by the Real Property Act, 1845 (*n*), a contingent interest, and a possibility coupled with an interest, in any tenements or hereditaments, whether the object of the gift, or limitation of such interest or possibility be or be not ascertained, may be disposed of by deed.

Double possibilities.

We have seen (*o*) that the limitation of an estate to an unborn person for life, with remainder to the issue of that unborn person, is invalid by reason of an independent rule above referred to.

Rule as to perpetuities.

It has often been said that the rule as to perpetuities (*p*) cannot apply to legal remainders, on the ground that the law as to remainders was well settled before the rule was enunciated (*q*); but it has recently been decided (*r*) that the rule does apply. These two contradictory views are perhaps capable of being

(*k*) Fearne, C. R. 303; and so where the legal estate is vested in a mortgagee; *Astley* v. *Micklethwait*, 15 Ch. Div. 59; Challis, R. P. 111. As to the effect of an equitable becoming a legal estate, see *Re Freme*, [1891] 3 Ch. 167.

(*l*) Challis, R. P. 66; Fearne, C. R. 366; and, as to fines, see *ante*, 69.

(*m*) 7 Will. IV. & 1 Vict. c. 26, s. 3.

(*n*) 8 & 9 Vict. c. 106, s. 6.

(*o*) *Ante*, p. 103. The rule is sometimes called the rule of double possibilities. See Butler's note to Fearne, C. R. 565; 4 Cruise, Dig. 350.

(*p*) *Ante*, p. 102.

(*q*) Challis, R. P. 183; and the authorities there cited. This view, though it may be historically correct, is erroneous in theory for the reason given, *ante*, at the end of p. 2.

(*r*) *Re Frost*, 43 Ch. 246.

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reconciled. It is admitted by all that the rule does not affect limitations subsequent to an estate tail, as such limitations had always been liable to destruction by barring the estate tail (*s*), so that the only remainders to which the rule can possibly apply are remainders subsequent to one or more estates for life. But, so long as the successive estates for life are limited to persons in being, a remainder expectant on the last of them is not affected by the rule. Again, if the limitations are to A. for life, with remainder to an unborn person for life, with remainder to B., a living person, B.'s estate is vested, and is not affected by the rule. If the limitations be to A. for life, with remainder to his unborn child for life, with remainder to unborn persons to be ascertained at his death, the estate of the last-mentioned unborn persons is void as offending against the rule of double possibilities; but it would also be void as offending against the rule as to perpetuities; and this appears to be the only case in which the rule as to perpetuities can apply to remainders.

"*Cy-près*" construction—on wills.

Where limitations to the children of an unborn person are contained in a will (*t*), although they cannot take effect in the precise manner indicated by the testator, still, in some cases, the Court, discovering in the will a "general intention" that the property should devolve on the testator's issue in succession, has carried out this intention as far as the rules of law will admit, namely, by construing the limitations to the unborn child and his children as a limitation to him in tail, instead of as distinct limitations to him for life, with remainder to his children, so that, although the tenant in tail can bar his estate tail and dispose of the property, still if he does not disentail, the estate will descend to his issue. The doctrine, under which this construction of the will is made, is called the "*cy-près*" doctrine (*u*).

There are two cases of frequent occurrence, in which the *cy-près* doctrine is applied, and which have been stated (*x*) as follows:—

"If real estate be devised to A. for life, with remainder to his first and other sons successively in tail, with remainder to his daughters as

(*s*) *Ante*, p. 103.

(*t*) See notes to *Cadell* v. *Palmer*, Tudor, L. C. R. P.

(*u*) The cases on the application of this doctrine will be found collected in Fearne, C. R. 204, note; and Theob. 487. Some of the distinctions are very nice and are not adapted for the consideration of the student.

(*x*) Hawkins on Wills, 181.

tenants in common in tail, with cross remainders between them, and A. is unborn at the death of the testator, A. is held to take an estate tail."

"If the devise be similarly to A. (the unborn person) for life, with remainder to his first and other sons in tail male, A. is held to take an estate in tail male."

The rule is not applied where the estates given to the unborn children of the unborn child are in fee simple (*y*), nor where those estates are for life only (*z*). Possibly it may be held to apply where there is an attempt to create estates for life in succession for ever (*a*).

(*y*) *Hale* v. *Pew*, 25 Beav. 335.
(*z*) *Seaward* v. *Willcock*, 5 East, 198.
(*a*) *Forsbrook* v. *Forsbrook*, L. R. 3 Ch. 98; *Mortimer* v. *West*, 2 Sim. 274.

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CHAPTER IX.

JOINT TENANCY.—COPARCENARY.—TENANCY IN COMMON.

ESTATES may be held (1) in Severalty; (2) in Joint Tenancy; (3) in Coparcenary; or (4) in Common.

I. Severalty.

Severalty is the ordinary species of ownership, and an estate is said to be held "in severalty" when it is held by an individual or body corporate alone, and without any other person or corporation participating in the estate. Thus, in the case of a grant to A., being an ordinary individual, or of a grant to a corporation, A. in the one case, and the corporation in the other, would each take an estate in severalty. They would not do this the less, if, in the former case the grant were to A. and his heirs, or to A. and the heirs of his body, in the latter to the corporation and their successors, since the words of inheritance or succession, though they point in terms to other persons, indicate only the estate conferred by the grant.

It is the individual and exclusive ownership that distinguishes an estate in severalty from the other kinds of ownership referred to. In each of the latter cases the tenant has no exclusive ownership in the land, or in any separate parcel of it. A joint tenant or coparcener owns the whole concurrently with others: a tenant in common is exclusive owner of an undivided share in the whole. But in the case of estates in land, or in a house, held under either of these modes of ownership, no one person has an exclusive right to any separate or particular acre of the land or part of the house. Each has, as the case may be, either concurrent ownership in the whole, or exclusive ownership in an undivided share in the whole. But if a partition of the property be made and the share of each be allotted to him, then each will take certain ascertained parcels of the land or part of the house, which will thenceforth be held by him in severalty.

While possessing this common characteristic, each of the three interests, joint tenancy, coparcenary, and tenancy in common, has features distinguishing it from the others.

II. Joint tenancy.

Right of survivorship.

Joint tenancy (*a*), as its name indicates, is essentially a joint interest: whatever may be the rights as between themselves, as regards strangers all the holders of an estate in joint tenancy are regarded as a single individual. It follows that, in case of the death of one of the joint tenants, the whole estate belongs to the survivors or survivor (*b*). Thus, in the case of a grant of lands to A. and B. jointly for their lives, each will be entitled to a moiety or equal half of the rents and profits during their joint lives; but the death of one does not put an end to the estate; it only causes a survivorship or representation to the whole estate in the other, and gives him the entire interest in the rents and profits. So, if lands be given to A. and B. and their heirs, on the death of either A. or B. the survivor takes the whole estate in fee simple. It is this right of survivorship which is the most marked characteristic of Joint Tenancy; and therefore there cannot be a joint tenancy between a natural person and a corporation (*c*).

It has been held that a devise to several persons as joint tenants, and to the survivor of them, his heirs and assigns, makes them joint tenants for life, with a contingent remainder in fee simple to the survivor (*d*).

Joint tenancy in tail.

There are certain rules peculiar to limitations in tail. A limitation to two or more persons and the heirs of their bodies creates a joint tenancy for their lives, with remainders to them severally in tail general (*e*), subject to the following exceptions:—

(a) Where they are two persons who might lawfully intermarry, in which case they take a joint estate in special tail (*f*).

(b) Where they are husband and wife, in which case they take an estate in special tail, but are at Common law tenants "by entireties" (as to which see *post*, p. 256), or, in cases within the Married Women's Property Act, 1882, joint tenants (*g*).

(*a*) Litt. s. 277; Co. Litt. 180 a; Challis, R. P. 333; 2 Cruise, Dig. 363.

(*b*) Litt. s. 280; Co. Litt. 181 a.

(*c*) See *Law Guarantee Society* v. *Bank of England*, 24 Q. B. D. 406; and Co. Litt. 190 a; 2 Wms. Saund. 318, note (4), and other authorities cited in that case. But, as to Government Stock, see 55 & 56 Vict. c. 39, s. 6.

(*d*) *Quarm* v. *Quarm*, [1892] 1 Q. B. 184.

(*e*) Challis, R. P. 333 (where see the reasons why an estate tail cannot in general be limited in joint tenancy) Litt. s. 283; *Re Tiverton Market Act*, 20 Beav. 375; *Tuffnell* v. *Borrell*, L. R. 20 Eq. 194.

(*f*) Challis, R. P. 334; Wms. R. P. 133.

(*g*) *Thornley* v. *Thornley*, [1893] 2 Ch. 229.

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By reason of the right of survivorship (the "*jus accrescendi*," as it is called) the lands of a joint tenant are not liable to dower or curtesy (*h*).

If, by the death of all the joint tenants but one, the ownership has become one in severalty, dower will attach. In an old case (*i*), in the time of Queen Elizabeth, a father and son, who were seised as joint tenants, with remainder to the heirs of the son, were both hanged at the same time. The son's wife could only be entitled to dower if her husband survived his father, since, had the father survived, there would not have been that sole seisin in the son upon which alone the dower would attach. The Court inferred from the facts proved that the son was the survivor, and therefore awarded dower to the wife.

It should here be noted that in certain cases, though there may be a joint tenancy at law, the beneficial interest is held in equity not to be joint, and there is then no *jus accrescendi* (*k*).

On the principle expressed in the maxim *jus accrescendi præfertur oneribus*, a rent-charge granted by a joint tenant is not binding on the joint tenants who survive him (*l*).

Unities.

A Joint Tenancy always arises by "purchase" (*m*), and there are certain conditions to its creation, namely, (1) unity of title; (2) unity as to the time of the title's commencement; (3) unity of interest as regards the quantity of the estate, and (4) unity of possession as well of every part as of the whole. These conditions are sometimes called the four "unities" of title, time, interest, and possession (*n*).

1. of title.

By "unity of title" is meant that the estate must be created by one and the same instrument, or originate in one and the same act (*o*). Thus, one joint tenant cannot acquire his title by deed and another by will, or partly by one and partly by the

(*h*) Co. Litt. 183 a. Notes to *Morley* v. *Bird*, Tudor, L. C. R. P., p. 884.

(*i*) *Broughton* v. *Randall*, Cro. Eliz. 503.

(*k*) See *Lake* v. *Craddock*, 1 W. & T. L. C. and notes. Familiar instances are lands held as partnership property, and mortgages (see *Re Jackson*, 34 Ch. Div. 732).

(*l*) Litt. s. 286. Notes to *Morley* v. *Bird*, Tudor, L. C. R. P.

(*m*) 2 Cruise, Dig. 364 (s. 3).

(*n*) So Cruise (quoted in *Morley* v. *Bird*, Tudor, L. C. R. P. 882); and 2 Bl., p. 180. Mr. Challis (R. P. 335) observes that this analysis "means only that each joint tenant stands, in all respects, in exactly the same position as each of the others; and that anything which creates a distinction either severs the joint tenancy or prevents it from arising."

(*o*) It must be created by some act, for an estate in joint tenancy cannot arise by descent (2 Bl. 181).

other; and so, if the title be one originating in wrong, as by the disseisin (*p*) of some former holder, all the parties claiming to hold a joint tenancy under the disseisin, must derive their title under one and the same disseisin, not under ousters effected at different periods (*q*).

An instance occurred of the application of this doctrine. Two persons were in lawful possession of lands, but the title under which they held came to an end—they were tenants *pur autre vie*, and the life ended, yet they continued in possession as owners; thus they went on holding without any title whatever, and so continued for more than twenty years. The question arose in what capacity they so held on. It was decided that they held as joint tenants. Lord Hatherley said:—

"The possession of each became wrongful at the same moment of time, so that they acquired their title at the same moment of time; they held by one common right or by one common wrongful title, whichever you please to call it, and they have done nothing to sever their tenancy" (*r*).

2. of time.

By "unity of time" of the commencement of title is meant that the estate must vest in all the joint tenants at the same instant.

"If lands be demised for life, the remainder to the right heirs of J. S. and J. N.; J. S. hath issue and dieth; and after J. N. hath issue and dieth, the issues are not joint tenants, because the one moiety vested at one time, and the other moiety vested at another time" (*s*).

Exceptions: i. Uses.

There are two exceptions to the rule. First, estates taking effect under the Statute of Uses (which we shall consider in a subsequent chapter), though vesting at several times, may nevertheless be estates in joint tenancy.

"If a man make a feoffment in fee to *the use* of himself and of such wife *as he should afterwards marry*, for term of their lives, and after he taketh wife, they are joint tenants, and yet they come to their estates at several times" (*t*).

The reason of the difference is that, in case of the use, the

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(*p*) *I.e.*, a wrongful putting out of him that is seised of the freehold.

(*q*) 2 Bl. 181; Litt. s. 278.

(*r*) *Ward* v. *Ward*, L. R. 6 Ch. 789.

(*s*) Co. Litt. 188 a.

(*t*) *Ib.*; and see notes to *Morley* v. *Bird*, Tudor, L. C. 882. As to the distinction where the limitation is to persons who are already husband and wife, see Co. Litt. 187 b and note (2) there; Co. Litt. 310 a; 2 Cruise, Dig. 375 (s. 50)

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estate is vested and settled in the feoffees till the future use comes into *esse* (*u*).

ii. Devises.

The second exception from the rule is in the case of estates created by devise. Thus, a testator devised land to his widow for life, and after her death to his daughter Isabella and her children and their heirs for ever (*x*). It was held that Isabella and her children took as joint tenants, she having one child at the time of the testator's death and other children subsequently born (*y*). Therefore, in the case put by Lord Coke of the gift in remainder to the right heirs of J. S. and J. N., though the issue of J. S. would not take as joint tenants, but as tenants in common, with the issue of J. N., yet the issue of J. S. and J. N. respectively would take as joint tenants between themselves (*z*).

The law is thus stated by Mr. Jarman (*a*):—

"Under a limitation in remainder of a use to children, they are not as they come *in esse*, let in with other persons who have not the whole interest; but the whole body always hold the whole interest, letting in other members of the body as they come *in esse*. But at Common law when the interest had once vested in remainder, the interest must vest either wholly or in a moiety; it must be either the one or the other, and there is no mode, as there is in a use, of getting the entirety into the remainderman, and then taking it out of him afterwards by the springing use as soon as the *cestui que use* comes *in esse*. Therefore, you have at once and for all to ascertain whether he would take the whole or a moiety: the intent being that he should take a moiety and not the whole, if he took the whole it would be against the intent. The result is, he takes a moiety, and holds it in common with the donee of the other moiety. A devise stands on the same footing in this respect as a conveyance to uses; and in the case of a trust, a Court of Equity will follow what is said to be the reason of the rule on uses and devises, viz., the intent, and the intent as appearing by the words, is to create a joint tenancy."

It has, however, been said that the case would be different if the children's estate were contingent on their attaining twenty-one (*b*). For where the remainder is limited to vest in such only of the class as attain twenty-one, then of necessity a tenancy in

(*u*) Co. Litt. 188 a, note (13) by Hargrave.

(*x*) *Oates* d. *Hatterley* v. *Jackson*, 2 Str. 1172; Fearne, C. R. 313; and see other cases cited in Tud. L. C. R. P. 882, 883.

(*y*) *Kenworthy* v. *Ward*, 11 Ha. 196, at p. 203. In that case the principle was applied to a bequest of personalty.

(*z*) *Bridge* v. *Yates*, 12 Sim. 645.

(*a*) 2 Jarman, p. 1119. The passage cited is in fact a summary of the judgment of Lord Hatherley (then Page-Wood, V.-C.) in *Kenworthy* v. *Ward*, 11 Ha. 196.

(*b*) *Per* Kindersley, V.-C., *Ruck* v. *Barwise*, 2 Dr. & Sm. 510.

common is created; for there may be several children, some of age, others not, and those who have contingent interests cannot take as joint tenants with those who have vested interests, since there is no mutuality of survivorship (*c*).

3. of interest.

Next, as to the "unity of interest." The quantity, or duration, of the estate of each joint tenant must be the same. One joint tenant cannot be seised for an estate of freehold, as for instance, for life, and another for a chattel interest, *i.e.*, for years; nor can one be tenant in fee, and the other tenant in tail; nor can a reversion be held in joint tenancy with an estate in possession (*d*). This, however, does not prevent the creation of a joint tenancy as to a particular estate, consistently with estates in severalty in remainder, or *vice versâ*. Thus an estate might be limited to A. and B. for their joint lives, with remainder to A. in fee; the separate remainder in A. expectant on the determination of the estate for the lives of A. and B. would not prevent that estate from being one in joint tenancy. So, to reverse the illustration, in the case of a limitation of the estate for life to A., with remainder to A. and B. and their heirs, the remainder would constitute a joint tenancy in A. and B., notwithstanding A.'s separate interest in the prior particular estate (*e*).

4. of possession.

As to the "unity of possession," the joint tenants do not hold in distinct shares, but each has the whole seisin or possession of every part as well as of the whole. This peculiar undivided seisin is termed in the ancient law books, a seisin *per my et per tout* (*f*). As to this, Blackstone (*g*) says:—

"Joint tenants are said to be seised *per my et per tout*, by the half or moiety, and by all; that is, they each of them have the entire possession, as well of every parcel as of the whole. They have not, one of them a seisin of one half or moiety, and the other of the other moiety; neither can one be exclusively seised of one acre, and his companion of another; but each has an undivided moiety of the whole, and not the whole of an undivided moiety" (*h*).

But "in another sense each has an aliquot share; namely for

(*c*) 2 Jarman, 1119.

(*d*) Litt. s. 302; Co. Litt. 118 a.

(*e*) 2 Bl. 181.

(*f*) Litt. s. 288.

(*g*) Vol. ii. 182.

(*h*) "It is true that, for certain purposes, joint tenants are potentially seised of aliquot parts of the land held by them in jointure, as for the purpose of alienation in severalty, either by grant or by demise; so for the purposes of merger, and where the joint tenancy happens to be between two persons only, their potential aliquot parts may, without impropriety, be termed 'moieties.' But this is not implied in the terms '*per my et per tout*;' the term '*my*'

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purposes of alienation, whether total or partial, and for purposes of forfeiture" (*i*).

The above must be taken subject to the provision of the Real Property Limitation Act, 1833 (*k*), which enacts:—

> S. 12. "That when any one or more of several persons entitled to any land or rent as co-parceners, joint tenants, or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land, or of the profits thereof, or of such rent for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons or any of them."

Since the passing of the statute, therefore, the possession of the land by one cannot be considered as the possession of another; nor, consequently, can the entry of one have the effect of vesting the possession in the other (*l*).

Husband and wife tenants by entireties (*m*).

There has been cited above the case put by Lord Coke of a limitation to the use of two persons who afterwards intermarry, as illustrative of a joint tenancy arising under different periods of commencement of title. In such a case the husband and wife continue to be joint tenants after the marriage; and the husband may sever the joint tenancy by alienating his own interest. But a limitation to persons who are husband and wife at the time of the limitation makes them, not joint tenants, but tenants "by entireties," and of this tenancy there can be no severance (*n*) by the husband, for he cannot alien so as to bind the wife's right if she survives him (*o*). Husband and wife, being but one person in law, cannot take the estate by moieties, but both are seised of the entirety (*p*)—in other words, of the whole but not of a part: and therefore the one cannot dispose of any part without the

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signifying, not a 'moiety,' but 'not in the least.' And therefore Lord Coke (Co. Litt. 186 a) gives the exact force of the expression 'seised *per my et per tout*,' by describing the party so seised as one, '*qui nihil habet et totum habet*;'" *Murray* v. *Hall*, 7 C. B. 455, note by Manning. (Coke's words are—"Et sic totum tenet et nihil tenet, scil. totum conjunctim, et nihil per se separatim.").

(*i*) Challis, R. P. 335, citing Co. Litt. 186 a.

(*k*) 3 & 4 Will. IV. c. 27.

(*l*) *Woodroffe* v. *Daniell*, 15 M. & W. 792. See *Burroughs* v. *M'Creight*, 1 J. & Lat. 220; *Re Hobbs*, 36 Ch. Div. 553: and other authorities cited in the note to this section in Shelford, R. P.

(*m*) Challis, R. P. 344; 2 Cruise, Dig. 373; *Chamier* v. *Tyrell*, [1894] 1 Ir. Rep. 267.

(*n*) *Doe* v. *Purratt*, 5 T. R. 652.

(*o*) *Back* v. *Andrew*, 2 Vern. 120.

(*p*) Co. Litt. 187 a; 299 b.

other (*q*). They are said to be seised *per tout*, and not *per my et per tout* as joint tenants (*r*). It was a consequence of the doctrine that husband and wife are, for most purposes, one person, that, if an estate was conveyed to a husband and wife and a third party as joint tenants, the husband and wife together took a moiety only, instead of one third each, and the third party took the other moiety, in the same way as if the grant had been to two persons only (*s*). It appears to be the result of recent decisions, that in cases falling within the Married Women's Property Act, 1882 (*t*), husband and wife together still take only one aliquot share as against other joint tenants, on the ground that the Act does not affect the doctrine that husband and wife are one person (*u*); but that as between themselves they no longer take by entireties but as joint tenants, and each therefore can sever the tenancy by alienation (*x*).

Release to joint tenant.

One joint tenant cannot properly convey his interest to another joint tenant by an assurance by which he could convey it to a stranger. The proper method is to convey it by a deed of release, an assurance which operates rather by extinguishing the right than by conveying any estate (*y*). And he to whom the release is made takes a fee simple without the word "heirs," because he is already seised *per my et per tout* of the fee and inheritance (*z*). It need hardly be said that there is no magic in words, and that a deed of grant would operate as a release (*a*). The Conveyancing and Law of Property Act, 1881 (*b*), does not make it necessary in limiting an estate to use words of limitation where it was not necessary before.

Severance.

The incident of survivorship (or as it is called "*jus accrescendi*"),

(*q*) Co. Litt. 326 a.

(*r*) Notes to *Morley* v. *Bird*, Tudor, L. C. R. P. 900.

(*s*) Litt. s. 291. But slight indication of intention will show that the rule is not to apply; *Re Dixon*, *Byram* v. *Tull*, 42 Ch. Div. 306.

(*t*) 45 & 46 Vict. c. 75.

(*u*) *Re March*, *Mander* v. *Harris*, 27 Ch. Div. 166, reversing Chitty, J., 24 Ch. Div. 222; *Re Jupp*, 39 Ch. Div. 148. In *Re March* the will was made before the Act, and the decision of the C. A. was limited so as not to extend to wills made after the Act. In *Re Jupp*, Kay, J., dissented from the opinion of Chitty, J., in *Re March*, that husband and wife each take an aliquot share as against other joint tenants; see also W. B. & C., p. 247.

(*x*) *Thornley* v. *Thornley*, [1893] 2 Ch. 229.

(*y*) For each joint tenant is seised of the whole. There could not therefore be livery of seisin as between them.

(*z*) Litt. s. 304; Elph. N. & C. Interp. 227.

(*a*) *Chester* v. *Willan*, 2 Wms. Saund. 96 a.

(*b*) 44 & 45 Vict. c. 41, s. 51; *ante*, p. 84.

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which is the consequence of the joint nature of the estate, is conditional on the estate remaining unchanged in its character at the death of one of the joint holders. For the joint nature of the interest in an estate held in joint tenancy does not preclude any holder from an alienation of his share, provided this be done in his lifetime; and the effect of an alienation to a stranger is a "severance" of the tenancy, so far as the severed share is concerned; for as the title to that share has a different origin, and commences at a different time, to the title to the other share or shares, the owner of it becomes tenant in common with the owner or owners of the other share or shares. If more than one of the original joint tenants be left after such alienation, they still remain joint tenants as between themselves. Thus, suppose A., B., and C. to be joint tenants in fee in certain lands, and A. to alien his share, A.'s alienee would take one equal undivided third as tenant in common with B. and C., which on his death intestate would descend to his heir; but B. and C. would remain joint tenants in two undivided thirds, and on the death of either, no alienation having been made, the survivor of B. and C. would take the whole two-thirds. From the moment of severance, then, the only unity left as between the alienee and other co-tenants is that of possession (*c*).

This severance can only be effected by act *inter vivos*. It cannot be effected by will, for the reason that a will takes effect upon the death of the testator; for, at the instant of his death, his interest ceases and is transferred by virtue of the *jus accrescendi*, to the surviving joint tenants; so that at the time the will comes into operation, there is nothing left in the testator for the devise to operate upon. This is expressed by the maxim, *jus accrescendi præfertur ultimæ voluntati* (*d*).

Partition.

A joint tenant may obtain a partition of the land, and an allotment to himself in severalty of some specific portion of the common property, commensurate in point of value with his share

(*c*) In *Caldwell* v. *Fellows*, L. R. 9 Eq. 410, *Burnaby* v. *Equitable, &c., Society*, 28 Ch. Div. 416, and *Re Hewett*, [1894] 1 Ch. 362, it was held that a covenant to settle property had the effect of severing a joint tenancy. But marriage does not of itself sever a joint tenancy between the wife and third persons, except as to such property as passes to and vests in the husband by the operation of law, upon the marriage, without any further act on his part; see *Re Butler's Trusts*, 38 Ch. Div. 286; *Palmer* v. *Rich*, [1897] 1 Ch. 134.

(*d*) Co. Litt. 185 b.

in the undivided whole. Originally, and at Common law, he could do this only by the agreement of all the joint tenants, the law not permitting any to destroy the common possession without the consent of all (*e*); and it was necessary that conveyances by deed should be executed for the purpose of vesting in each party a several estate in the portion to be taken by him (*f*). But a contract by a joint tenant to sell, though it does not sever the joint tenancy at law, would sever it in equity (*g*).

Writ of partition.

Certain statutes of the reign of Henry VIII. (*h*) rendered partition compulsory by Common law process at the instance of any joint tenant, who might sue out a writ for that purpose, called a "writ of partition." The process by writ of partition directed to the sheriff was practically superseded by the procedure authorized under the Act 8 & 9 Will. III. c. 31 (*i*); and the writ of partition was abolished by the Real Property Limitation Act, 1833 (*k*). Partition was also obtainable by a suit in equity (*l*), and the jurisdiction in equity, originally concurrent, became exclusive after the above-mentioned Act of 1833 (*m*). Partition is now obtained by action in the Chancery Division of the High Court, or, where the property does not exceed £500 in value, in the County Court of the District (*n*). The partition may be made by means of a commission; but the usual course is to direct it to be made in chambers (*o*). By partition at law the legal estate was vested; but where partition is made by agreement or by decree of the Court, mutual conveyances between the parties must be executed (*p*), which, as we have seen, should be in form releases, and under the Real Property Act, 1845, they must be by deed (*q*).

Partition may be made also without conveyances through the

(*e*) Litt. s. 290.

(*f*) Co. Litt. 169 a; 187 a; 2 Cruise, Dig. 384.

(*g*) *Brown* v. *Raindle*, 2 Ves. 257.

(*h*) 31 Hen. VIII. c. 1; 32 Hen. VIII. c. 32; see 2 Cruise, Dig. 384, as to the mode of proceeding under these statutes. And see *Miller* v. *Warmington*, 1 Jac. & W. 484.

(*i*) 2 Cruise, Dig. 386.

(*k*) 3 & 4 Will. IV. c. 27, s. 36.

(*l*) See Hargrave's note (2), s. vii., to Co. Litt. 169 a; 2 Cruise, Dig. 388, s. 42; *Agar* v. *Fairfax*, 2 W. & T. L. C., and notes.

(*m*) See *Mayfair Property Co.* v. *Johnston*, [1894] 1 Ch. 508.

(*n*) 31 & 32 Vict. c. 40, s. 12.

(*o*) See Pemberton on Judgments, 629, and Forms: Seton, Forms, at p. 1559, and notes at p. 1568.

(*p*) *Attorney-General* v. *Hamilton*, 1 Mad. 214; Seton, 1569, 1570.

(*q*) 8 & 9 Vict. c. 106, s. 3. See form of agreement for Partition, 2 K. & E. 264, and forms of Deeds of Partition, in Stud. Prec. 44, and 2 K. & E. 271, *et seq.*

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Board of Agriculture (*r*), under the Inclosure Acts (*s*), and this, being the cheaper method, is now more usually adopted.

Settled Land Act, 1882.

By the Settled Land Act, 1882 (*t*), a power to concur in partition is given to tenants for life and other limited owners generally in respect of settled lands, where the settlement comprises an undivided share in land, or, under the settlement, the settled land has come to be held in undivided shares (*u*). It is not therefore necessary now in ordinary cases that the settlement should contain an express power to concur in partition; but, if necessary, special powers can be added, which will operate as if conferred by the Act, unless a contrary intention is expressed in the settlement (*x*). By the Settled Land Act, 1890 (*y*), on a partition, easements may be reserved or granted, or given or taken for land or for any other easement; and where a partition is to be made with the tenant for life of land, an undivided share whereof is subject to the settlement, the trustees of the settlement are to stand in the place of and represent the tenant for life, and have all his powers in reference to the transaction (*z*).

Sale in lieu of Partition.

In cases where the Court can make a decree for partition, it now has power under the Partition Act, 1868 (*a*), at the request of any party interested, notwithstanding the dissent or disability of others, to direct a sale (*b*); and at the request of the party or parties interested, individually or collectively, to the extent of one moiety or upwards, it is bound to direct a sale of the property and distribution of the proceeds instead of a division of the property, "unless it sees good reason to the contrary" (*c*).

The necessity of conferring this power of sale upon the Court may be seen from consideration of the following case:—

"Plaintiff was entitled to two-thirds of a house, and defendant to the other third; it was of great value to both parties; to the defendant as shopkeeper, and to the plaintiff as contiguous to other estates. Lord Eldon at first, out of mercy to the parties, let it stand over,

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(*r*) See *ante*, p. 54, note (*y*).

(*s*) See the form in 2 K. & E. 269, and the notes thereto.

(*t*) 45 & 46 Vict. c. 38 (ss. 3 (iv.), 4, 19, 20, 31, 45).

(*u*) See *ante*, p. 51, *et seq.*

(*x*) 45 & 46 Vict. c. 38, s. 57.

(*y*) 53 & 54 Vict. c. 69, s. 5.

(*z*) *Ib.* s. 12.

(*a*) 31 & 32 Vict. c. 40 (amended by the Partition Act, 1876, 39 & 40 Vict. c. 17). See Seton, 1553; and notes to the Partition Acts in Shelford, R. P. Stat. 739, *et seq.*

(*b*) 31 & 32 Vict. c. 40, s. 3; *Pitt* v. *Jones*, 5 App. Cas. 651; *Richardson* v. *Feary*, 39 Ch. Div. 45.

(*c*) 31 & 32 Vict. c. 40, s. 4. See *Pemberton* v. *Barnes*, L. R. 6 Ch. 685; and *Porter* v. *Lopes*, 7 Ch. Div. 358.

proposing a reference as to the value, and to which party the option of buying or selling should be given; and afterwards he said, the difficulty was no objection in that Court. He was, therefore, of opinion that if the parties insisted upon having the law take its course, the commission to partition might proceed. The commission having been executed, an exception was taken by the defendant, on the ground that the commissioners had allotted to the plaintiff the whole stack of chimneys, all the fire-places, the only staircase in the house, and all the conveniences in the yard. But Lord Eldon overruled the exception, saying, he did not know how to make a better partition for the parties; that he granted the commission with great reluctance, but was bound by authority; and it must be a strong case to induce the Court to interpose, as the parties ought to agree to buy and sell" (*d*).

Severance by accession of interest.

Independently of either alienation or partition, a joint tenancy may also be destroyed by an accession of a new interest beyond that to which the joint tenancy applies. Therefore, if there be two joint tenants for life, and the inheritance is purchased by or descends upon either, it is a severance of the joint tenancy (*e*).

Trustees.

Covenants by and with joint tenants.

Trustees are always made joint tenants, and joint tenancy usually indicates trusteeship. In the case of a sale by trustees, the trustees only covenant that they have not encumbered, and the form of covenant is several—that is, each of them covenants so far only as relates to his own acts, &c. (*f*) Where the conveyance is by joint tenants as beneficial owners, they enter into the usual covenants for title, but also in the form of several covenants, confined to their own acts, &c.; for, if they were to covenant jointly, all would be liable for the acts of each, and the whole burden of the covenant would devolve on the survivors or survivor (*g*). Such covenants by joint tenants may now be shortened in form, by virtue of the Conveyancing and Law of Property Act, 1881. Thus, where each expressly conveys "as beneficial owner" as to his share, a several covenant will be implied; similarly, if all convey as beneficial owners, a joint covenant will be implied (*h*). But if the conveyance is to them and the covenants are entered into with them, the covenants should be with them jointly (*i*); and such will be the covenants

(*d*) *Turner* v. *Morgan*, 8 Ves. 143.

(*e*) 2 Bl. 186. The reason appears to be that in the case put in the text the estate for life in one moiety is destroyed by merger in the inheritance.

(*f*) See form, 1 K. & E. 602 (iv.).

(*g*) See form, 2 Dav. Prec. i. 359, note.

(*h*) 44 & 45 Vict. c. 41, ss. 7, 64, and see examples in 1 K. & E. 407, *et seq.*

(*i*) 1 Dav. Prec. 112, 114; and 2 Dav. Prec. i. 359, note, and 421. As to the obligation thereby implied, see Conv. and Law of Prop. Act, 1881 (44 & 45 Vict. c. 41), s. 60, in Appendix, *post*, and *ante*, p. 169.

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for title implied in a conveyance under the Conveyancing and Law of Property Act, 1881 (*k*).

III. Coparcenary.

The nature of an estate in Coparcenary is best explained in the words of Blackstone. He says (*l*) :—

"An estate held in coparcenary is where lands of inheritance descend from the ancestor to two or more persons. It arises either by common law, or particular custom. By common law : as where a person seised in fee simple or in fee tail dies, and his next heirs are two or more females, his daughters, sisters, aunts, cousins, or their representatives ; in this case they shall all inherit, and these co-heirs are then called 'coparceners ;' or, for brevity, 'parceners' only. Parceners by particular custom are where lands descend, as in gavelkind, to all the males in equal degree, as sons, brothers, uncles, &c. And, in either of these cases, all the parceners put together make but one heir ; and have but one estate among them.

"The properties of parceners are in some respects like those of joint tenants ; they have the same unities of interest, title, and possession. They may sue and be sued jointly for matters relating to their own lands : and the entry of one of them shall in some cases enure as the entry of them all. They cannot have an action of trespass against each other : but herein they differ from joint tenants, that they are also excluded from maintaining an action of waste ; for coparceners could at all times put a stop to any waste by a writ of partition, but till the statute of Henry VIII., joint tenants had no such power. Parceners also differ materially from joint tenants in four other points : 1. They always claim by descent, whereas joint tenants always claim by purchase. Therefore, if two sisters purchase lands, to hold to them and their heirs, they are not parceners, but joint tenants (*m*) ; and hence it likewise follows, that no lands can be held in coparcenary, but estates of inheritance, which are of a descendible nature ; whereas not only estates in fee and in tail, but for life or years, may be held in joint tenancy. 2. There is no unity of time necessary to an estate in coparcenary. For if a man hath two daughters, to whom his estate descends in coparcenary, and one dies before the other, the surviving daughter and the heir of the other, or, when both are dead, their two heirs, are still parceners ; the estates vesting in each of them at different times, though it be the same quantity of interest, and held by the same title. 3. Parceners, though they have a unity, have not an entirety of interest. They are properly entitled each to the whole of a distinct moiety ; and of course there is no *jus accrescendi*, or survivorship between them : for each part descends severally to their respective heirs though the unity of possession continues. And as long as the lands continue in a course of descent,

(*k*) 44 & 45 Vict. c. 41, s. 7 (1).

(*l*) Vol. ii., p. 187 ; Litt. s. 241 ; Co. Litt. 163 a ; Challis, R. P. 341 ; 2 Cruise, Dig. 391.

(*m*) Litt. s. 254. Therefore, where in a settlement lands were limited to the right heirs of A. as purchasers, and A.'s heirs were three of his sisters and the daughters of a deceased sister, it was held that these daughters, having survived the three sisters, took the whole by survivorship ; *Berens* v. *Fellowes*, 35 W. R. 356 ; 56 L. T. 391.

and united in possession, so long are the tenants thereof, whether male or female, called parceners."

Partition.

"They are called parceners," says Littleton (*n*), "because by the writ the law will constrain them, that partition shall be made among them." This partition was at Common law, and not, as in the case of joint tenants or tenants in common, under statutes (*o*), because, it was said, descent was an act of the law (*p*). At Common law the partition might be by parol, and did not require an actual conveyance; for by partition the coparceners do not acquire their shares by purchase, but continue to be entitled by descent. For the same reason in case of the death of one coparcener intestate after partition, the heir is to be traced, not from such one as last purchaser, but as if no partition had been made (*q*). Partition or sale may now be obtained by action in the Chancery Division or through the Board of Agriculture, as in the case of joint tenancy (*r*).

Like joint tenancy, coparcenary is destroyed by the destruction of the unity of the title. Thus an alienation by one coparcener destroys the coparcenary as to that one. Of course, in the event of the descent of the entirety of the land upon a single coparcener, that coparcener thenceforth holds in severalty (*s*).

Advowson (in whom right to present).

There is a peculiarity in reference to the estate of coparcenary as to an advowson, or the right of presentation to a living, that is, the appointment of a clergyman to an ecclesiastical benefice.

When an advowson descends to coparceners and they cannot agree to present, they present successively according to seniority; and this privilege extends not only to the heirs, but to the assignees of each coparcener, whether by conveyance or act of law; so that a tenant by the curtesy shall have the same turn as his wife would have had (*t*). And notwithstanding partition, each coparcener will present in turn, unless there has been an express exception, because in the case of coparceners, the severance by partition is said to take place by operation of law (*u*).

On the other hand, joint tenants and tenants in common must concur in a presentation, but if they present different clerks, the bishop may admit either or refuse both; but where a Protestant

(*n*) S. 241.
(*o*) Viz., of Hen. VIII. *Ante*, p. 259.
(*p*) Co. Litt. 163 b.
(*q*) *Doe* v. *Dixon*, 5 Ad. & El. 834.
(*r*) *Ante*, pp. 259, 260.
(*s*) 2 Bl. 191.
(*t*) 2 Dav. Prec. i. 38.
(*u*) *Fox* v. *Bishop of Chester*, Tudor, L. C. R. P. 257.

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and a Roman Catholic are tenants in common, the right of presentation is in the Protestant alone. If tenants in common cannot agree in presentation they must draw lots for choice (*x*).

IV. Tenancy in common. Creation.

Tenancy in Common differs from coparcenary in that it cannot be created by descent, and, on the other hand, its only similarity, as regards the unities, to a joint tenancy is in its unity of possession. Thus Blackstone says (*y*) :—

"Tenants in common are such as hold by several and distinct titles, but by unity in possession; because none knoweth his own severalty, and therefore they all occupy promiscuously. This tenancy therefore happens where there is an unity of possession merely, but perhaps an entire disunion of interest, of title, and of time. For, if there be two tenants in common of lands, one may hold his part in fee simple, the other in tail, or for life; so that there is no necessary unity of interest: one may hold by descent, the other by purchase; or the one by purchase from A., the other by purchase from B.; so that there is no unity of title; one's estate may have been vested fifty years, the other's but yesterday; so there is no unity of time (*z*). The only unity there is, is that of possession; and for this Littleton gives the true reason, because no man can certainly tell which part is his own: otherwise even this would soon be destroyed."

It should be added that the shares of tenants in common may be unequal.

Common Law. Equity.

It has been said that, while the Common law was in favour of a joint tenancy, equity favoured tenancy in common. The following case (*a*) relates to personal property, but the same principles apply to realty:—A. by will gave all his property to his daughter I. on condition that she paid to the four daughters of his brother J. "four hundred pounds out of seven, now lying in the £3 per Cent. Consolidated." It was held, that the legacy to the four daughters, being without words of severance, created a joint tenancy therein, and that the whole survived to M., the surviving daughter. In giving judgment, Sir R. P. Arden, M.R., said:—

"Great doubts have been entertained by Judges, both at law and in equity, as to words creating a joint tenancy or a tenancy in common; and it is clear the ancient law was in favour of a joint tenancy; and that law still prevails: unless there are some words to sever the interest taken, it is at this moment a joint tenancy, notwithstanding the leaning

(*x*) *Fox* v. *Bishop of Chester*, Tudor, L. C. R. P. 263, *et seq.*

(*y*) Vol. ii., p. 191; Co. Litt. 188 b; Challis, R. P. 336; 2 Cruise, Dig. 399.

(*z*) Tenancy in common may be by prescription; Litt. s. 310.

(*a*) *Morley* v. *Bird*, 3 Ves. 629; and Tudor, L. C. R. P. 876.

of the Courts lately in favour of a tenancy in common. A legacy of a specific chattel, a grant of an estate, is a joint tenancy. It is true, the Courts, seeing the inconvenience of that, have been desirous, wherever they could find any intention of severance, to avail themselves of it: and their successive determinations have laid hold of any words for that purpose. 'Equally to be divided,' 'equally, among, between,' even in law I believe, certainly in equity, create a tenancy in common; but without those words it is a joint tenancy" (*b*).

And again, in another case previously referred to (*c*), Page-Wood, V.-C., stated:—

"It was said that the inclination in equity has been to favour tenancies in common and not joint tenancies. The Court has so far done this as to say, that, where it finds slight words of intention of severance, the course is to act upon them; but where the words are such as to create a joint tenancy, that must be taken to be the real intent of the conveyance, unless there is some distinct ground to prevent its operation."

Form of creation by deed.

The usual mode of creating a tenancy in common by deed is to limit the estate to two or more persons "as tenants in common" (*d*)—*e.g.*, to A. B. and C. D. their heirs and assigns as tenants in common. Now that, under the Conveyancing and Law of Property Act, 1881, it is not necessary to express words of inheritance, but "in fee simple" or "in tail" are sufficient, the form may be—to A. B. and C. D. in fee simple (or in tail) as tenants in common (*e*).

Cross remainders (*f*).

When lands are given in undivided shares to two or more persons for particular estates, so as that, upon the determination of the particular estates in any of those shares, they and the accruing shares remain over to the other grantees, and the remainderman or reversioner is not let in till the determination of all the particular estates; then the grantees take their original shares as tenants in common, and the remainders limited among them, on failure of the particular estates, are known by the appellation of "cross-remainders." But no technical words are required to create cross-remainders: any words which sufficiently indicate the intention of the parties will be sufficient for the purpose (*g*).

The following form is frequently found in strict settlements:

(*b*) Generally as to what words create a joint tenancy by deed or will, and what a tenancy in common, see notes to *Morley* v. *Bird*, Tudor, L. C. R. P. 885, 894.

(*c*) *Kenworthy* v. *Ward*, 11 Hare, 196, at p. 204; *ante*, p. 254.

(*d*) 2 Dav. Prec. i. 333.

(*e*) 44 & 45 Vict. c. 41, s. 51.

(*f*) Elph. Introd. 378; Challis, R. P. 338.

(*g*) 4 Cruise, Dig. 298; Co. Litt. 195 b.

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the property is conveyed to the trustees to the use of A. (the settlor) for life, and after his death to uses in favour of his sons, with remainder—

"To the use of all the daughters of said A. and the heirs of their respective bodies in equal shares as tenants in common. And if there shall be a failure of issue of any such daughter, then as well as to her original share as to any share or shares which shall have accrued to her or to the heirs of her body by virtue of this present limitation To the use of the others of such daughters and the heirs of their respective bodies in equal shares as tenants in common. And if there shall be a failure of issue of all such daughters but one, or if there shall be but one such daughter, then as to the entirety of the same premises To the use of such one or only daughter and the heirs of her body" (*h*).

It is a fundamental rule that cross-remainders cannot be implied in a deed (*i*), but in a will they may be raised by implication, on the ground that, the testator being *inops concilii*, by construction his words ought to be made to answer his intent appearing in other parts of the will as near as may be (*k*).

Partition. Dower. Curtesy.

What has been said in respect of partition of a joint tenancy applies equally to a tenancy in common (*l*). But lands held in common, unlike those in joint tenancy, are subject to dower and curtesy.

Covenants by and with tenants in common.

Reference has been made to the covenants for title usually entered into by joint tenants on a sale of lands by them. Tenants in common enter into similar covenants, but with this difference in form, that they are expressed to be "so far only as relates to the (*e.g.*) one equal undivided fourth share of which he claims to be seised and to his own acts, &c." (*m*) When the tenants in common are covenantees, the covenants should be entered into with them severally (*n*); and such will be the covenants for title implied in a conveyance under the Conveyancing and Law of Property Act, 1881 (*o*).

Joint tenants and tenants in common. Waste. Repairs.

By the Statute of Westminster the Second (*p*) the action of waste was given to one tenant in common of the inheritance against another making waste in the estate held in common. The equity of this statute, it was said, extended to joint tenants but not to

(*h*) See forms, Stud. Prec. 89; 2 K. & E. 553, 763.

(*i*) Elph. N. & C. Interp. 289.

(*k*) See Co. Litt. 195 b (Butler's note); and notes to *Gardner* v. *Sheldon*, Tudor, L. C. R. P., p. 656.

(*l*) See *Mayfair Property Co.* v. *Johnston*, [1894] 1 Ch. 508.

(*m*) See 1 K. & E. 404, 407, 513; *ante*, p. 261.

(*n*) 1 Dav. Prec. 117; and see form, 2 Dav. Prec. i. 333.

(*o*) 44 & 45 Vict. c. 41, s. 7 (1).

(*p*) 13 Edwd. I. c. 22.

coparceners, because by the old law they might make partition, and thereby prevent future waste, but tenants in common and joint tenants could not; and therefore the statute gave them this remedy, compelling the defendant either to make partition, and take the place wasted to his own share, or to give security not to commit any further waste (*q*). As between tenants in common or joint tenants, a Court of Equity will not grant any injunction against committing waste, unless the waste be what is called voluntary, that is, positive and actual destruction, as cutting trees not fit to cut (*r*); and one tenant in common (it has been decided, and doubtless a joint tenant) may get, or license another to get, minerals under the property; only he must not appropriate to himself more than his proper share of the proceeds, which is matter of account, and that is the only remedy which will be granted (*s*). Under the Judicature Act, 1873 (*t*), such account must be obtained in the Chancery Division of the High Court; this provision practically repeals 4 Anne, c. 16, s. 27, which gave a right of action of account to one co-tenant against another. And one tenant cannot maintain an action against a co-tenant for a contribution to the cost of repairs, where the money expended has been for ordinary repairs and not such as were absolutely necessary for the prevention of ruin (*u*).

The possession and seisin of one tenant in common was formerly accounted to be the possession and seisin of the others (*x*); but this is no longer the case since the Real Property Limitation Act, 1833 (*y*).

(*q*) 2 Inst. 403, 404; Co. Litt. 200 b.

(*r*) *Twort* v. *Twort*, 16 Ves. 131. *Ante*, p. 41.

(*s*) Co. Litt. 172 a, 200 b; *Job* v. *Potton*, L. R. 20 Eq. 84.

(*t*) 36 & 37 Vict. c. 66, s. 34, § 3.

(*u*) *Leigh* v. *Dickeson*, 12 Q. B. D. 194; 15 Q. B. D. 60; *Re Jones, Farrington* v. *Forrester*, [1893] 2 Ch. 461, at p. 478; *Re Cook's Mortgage*, [1896] 1 Ch. 923.

(*x*) See 2 Cruise, Dig. 402.

(*y*) 3 & 4 Will. IV. c. 27, s. 12, set out on p. 256, *ante*.

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CHAPTER X.

USES AND TRUSTS.—EXECUTORY INTERESTS.

We now proceed to a subject to which occasional reference has already been made, and which occupies a prominent place in the English law of real property, viz., the Statute of Uses (27 Hen. VIII. c. 10).

The law before Statute of Uses.

Seisin—Legal estate.

A clear understanding of the nature and meaning of a legal "seisin," and of the distinction between "legal" and "equitable" estates is essential to the just apprehension of this subject.

The only estates of freehold recognized by the Common law were estates for life, estates in fee simple, and, after the Statute *De Donis*, estates tail (*a*). An estate of freehold in possession could only be created or transferred by "livery of seisin," *i.e.*, actual delivery of the possession of the land. This was generally effected by what is called a "feoffment" (*b*), *i.e.*, the person in possession of the land actually delivered a sod of turf or a piece of thatch of a house, or some other thing, as representing the land, to the person to whom the land was to be conveyed. The conveyance might also be made by fine (*c*) or recovery (*d*). These as we have above explained (see Chap. III.), were fictitious actions, the last stage of which was livery of seisin made by the sheriff to the person to whom the land was to be conveyed (*e*).

It will be observed that the transfer of the ownership was always open and notorious. The object of this notoriety, it has been said, was, that the lord might always know to whom he might apply for the services due from the tenant, and for the

(*a*) *Ante*, p. 65.

(*b*) See *post*, p. 364. As to livery of seisin, see Co. Litt. 48 a. The King did not convey by feoffment, but by grant entered of record; *Case of the Duchy*, Plowd., at p. 213.

(*c*) 5 Cruise, Dig., tit. xxxv.; *ante*, p. 69.

(*d*) 5 Cruise, Dig., tit. xxxvi.; *ante*, p. 67.

(*e*) Where the conusee, the person to whom the fine was levied, was in possession, a writ was of course unnecessary. After the Statute of Uses a writ of possession was not sued out where the fine was levied to uses.

profits arising from such incidents of tenure, of aids, reliefs, heirships, descents, or forfeitures (*f*).

Courts of Common Law did not recognize equitable rights.

The Common Law Courts of England recognized in relation to land no other ownership than that which was either conferred originally by livery of seisin by the lord, or transferred from one tenant to another by the same solemnity (*g*). Though the person seised in possession, called the "terre-tenant," or sometimes "the tenant," simply (*h*), were seised for another beneficially; though he had even sold his interest to another for a valuable consideration; though he had acknowledged that he held the estate not for his own use but for another; still, so long as the actual seisin remained in him, without having been divested by a formal assurance, whether feoffment, fine or recovery, the Common Law Courts treated the estate as vested in him alone, and not only refused to inquire whether there was an interest in the land in any other person, but would even shut their eyes to its existence when shewn. To such a length was this carried that if the beneficial owner, for whose benefit the estate was held by the terre-tenant, had acquired possession of the land without livery being made to him, he would be treated as a mere trespasser as against the person seised; while, if out of possession, he would be regarded as an entire stranger (*i*).

Ejectment.

For some centuries immediately preceding the 1st November, 1875, when the Judicature Act, 1873 (*k*) came into operation, the ordinary action at Common law for the recovery of land was an "ejectment" (*l*). In this action the only question considered was, who had the right at law to the possession. The plaintiff could only succeed by shewing that he had at law a right to the possession, and, if his title was merely equitable, he could not shew this. This was carried so far that the person in possession could, except where a landlord brought ejectment against his tenant, make a perfectly good defence by shewing that the legal right to the possession was in a stranger.

Court of Chancery.

There arose (*m*) in process of time another Court with a

(*f*) Notes to *Tyrrell's Case*, Tudor, L. C. R. P. 336.

(*g*) A term of years, which could be created or transferred without livery, was not originally an estate at Common law; Challis, R. P. 53; *ante*, pp. 16, 159.

(*h*) See the meaning of "*terre-tenant*," *ante*, p. 20, note (*x*).

(*i*) 2 Bl. 328.

(*k*) 36 & 37 Vict. c. 66.

(*l*) *Ante*, p. 7; 3 Bl., Ch. X., and Form in Appendix. See Lightwood on Possession of Land, Ch. VI.

(*m*) See Kerly, Historical Sketch, 6.

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jurisdiction called an equitable jurisdiction, outside that of the ordinary Common Law Courts, namely, the Court of Chancery. This Court recognized the beneficial interest, and gave effect to it by calling upon the terre-tenant to discharge the obligation under which he held the land; but, notwithstanding the establishment of this equitable jurisdiction, the Courts of Common Law still pursued their ancient course, and recognized only the legal seisin, leaving the beneficial interest to be dealt with in the Court of Chancery.

The result was that if A. was seised in trust for B., and B. was in possession, A. would, by an action at law, have been able to recover the land from B. But A. might be compelled by a suit in Chancery to deal with his estate for the benefit of B., the equitable owner; and there sprang up the practice of granting an injunction in Chancery at the suit of the equitable owner, restraining the legal owner from ejecting him by action at law, or sometimes of allowing the Common law action to proceed on the terms that the plaintiff, if successful, should deal with the land as the Court of Chancery should direct. This was only an order binding the defendant personally, so that he might be committed to prison if he disobeyed it; but it in no way affected the power or the jurisdiction of the Courts of Common Law.

Equitable estate.

It is only the ownership recognized in the Courts of Common Law, which is termed the "legal estate." The beneficial ownership, recognized in a Court of Equity only, is termed the "equitable estate."

Thus, let us suppose A., seised of the land, to have executed a declaration acknowledging that, though the legal estate was in him, yet the property belonged in fact to B., and that he, A., only held as a trustee for B.; yet if B., wrongfully kept out of possession by A., brought an action in a Court of Common Law for the recovery of the land (and the action of ejectment would have been the ordinary one for the purpose), the action would necessarily have failed, because the legal estate, to which the Common law would attach the right of possession, would be in A., and not in B., and the acknowledgment of the trust would have been disregarded. B.'s only remedy would have been in equity; and even then, all that the Court of Chancery could have done would have been, not to award the possession to B., but to direct A. to place B. in his, A.'s, own position—namely,

to order him to execute a conveyance of the estate to B. or as he should direct, and to account to him for the mesne profits; and it would not have been until after this conveyance to B. had been executed, and B. had by its means obtained the legal ownership or estate, that he could have proceeded with effect in a Court of Common Law to recover the possession. The practical result was that B. could exercise most of the rights of an owner, while A. remained liable to perform the services by which the land was held.

The nature of these two estates, legal and equitable, is well described by Mr. Hayes (*n*):—

"Thus, there existed two distinct kinds of proprietorship, the subjects of distinct modes of alienation, and the objects of distinct jurisdictions. The vulgar notion of 'Equity' is that of a mild and liberal tribunal, tempering the austerity of the law. The correct legal notion, with reference to the subject before us, is that of a judicature peculiar in its constitution, searching the conscience, and acting against the person of an individual intrusted with the keeping of the land, as distinguished from a judicature consulting the Common law, and awarding possession of the land itself."

Judicature Act, 1873.

By the Judicature Act, 1873 (*o*), the jurisdictions, both of the Courts of Common Law and of the Court of Chancery, were transferred to the High Court of Justice, and it was enacted that:—

S. 25, § 11. "Generally in all matters, not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of the Common law with reference to the same matter, the rules of equity shall prevail."

As to County Courts, the Judicature Act, 1873 (*o*), provides as follows:—

S. 89. "Every inferior Court which now has, or which may, after the passing of this Act, have jurisdiction in equity, or at law and in equity, and in admiralty respectively, shall, as regards all causes of action within its jurisdiction for the time being, have power to grant, and shall grant in any proceeding before such Court, such relief, redress, or remedy, or combination of remedies, either absolute or conditional, and shall in every such proceeding give such and the like effect to every ground of defence or counterclaim, equitable or legal (subject to the provision next hereinafter contained), in as

(*n*) Popular View of the Law of Real Property, p. 26.

(*o*) 36 & 37 Vict. c. 66.

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full and ample a manner as might and ought to be done in the like case by the High Court of Justice" (*p*).

Use.

The purpose for which property was held by the person having the legal estate for the benefit of another, was termed a "use" (*q*). The personal nature of the use is pointed out by Lord Coke who defines it as:—

> "A trust or confidence, which is not issuing out of land, but as a thing collateral annexed in privity to the estate, and to the person, touching the land; *scil.*, that *cestui que use* shall take the profits, and that the ter-tenant [*i.e.*, the feoffee] shall make estates according to his direction. So that he who hath an use hath not *jus neque in re neque ad rem*, but only a confidence and trust, for which he hath no remedy by the Common law, but his remedy was only by subpœna in Chancery. If the feoffees would not perform the order of the Chancery, then their persons, for the breach of the confidence, were to be imprisoned till they did perform it" (*r*).

Uses, how created.

Expressly.

The ordinary mode of creating a use was by conveyance, made by feoffment or fine, to a stranger in fee simple, with a direction, either oral, or expressed by deed, that he was to stand seised of the lands to the uses indicated. Sometimes uses were created by the declaration of the person seised of the land without any conveyance being made; but in this case, where the seisin is not changed, no use (at all events since the Statute of Uses) can be created without the consideration of money, money's worth, blood or marriage (*s*). It should be noted that the declaration of use need not be made at the same time as the conveyance; it may be made either before or after it, and when the conveyance was effected by fine this was necessarily the case.

By implication —"resulting use."

But uses sometimes arose, not by express creation, but by legal implication. If, for example, A. made a feoffment to B. in fee simple without consideration and without any declaration of use, there was a resulting use to A. in fee simple. But this was not the case if B. took for life or in tail, or if (before the Statute of

(*p*) As to the powers of the County Court, see *Martin* v. *Bannister*, 4 Q. B. D. 491; *Richards* v. *Cullerne*, 7 Q. B. D. 623.

(*q*) As to the etymology of "use," see L. Q. R. 115.

(*r*) *Chudleigh's Case*, 1 Rep. 121 b; cp. Co. Litt. 272 b; see Tudor, L. C. R. P., notes to *Tyrrell's Case*, 337. "*Jus in re*" means a proprietary right. "*Jus ad rem*" means a personal right of action; and the sense of the passage quoted is that *cestui que use* had no rights recognized by a Court of Common Law; he had, at Common law, neither an estate nor a right of action against the person who had the legal estate: see the explanation in Elph. Introd., Ch. I., pp. 6, *et seq.*

(*s*) Elph. N. & C. Interp. 149.

Quia Emptores) B. took in fee simple to hold of A.; for the tenure created in either of these cases between A. and B. was sufficient to show that B. was intended to take beneficially, *i.e.*, to take the use. Again, if A. made a feoffment to B. in fee simple, and uses were declared that did not exhaust the fee simple, so much of the use as was undisposed of resulted to A. (*t*)

Equity following, and not following, the law.

In dealing with uses, when relief was sought in the Court of Chancery, the principle was generally to assimilate the equitable to the legal ownership, and to treat the legal ownership as practically held for the benefit of the real beneficiary. Thus, uses were descendible according to the rules of the Common law, or of the local custom, in the same manner as the legal estate in the land. But concurrently with this, the Court of Chancery so far at times contravened the principles of the Common law, that it disregarded some of the stricter rules as to the legal seisin, and allowed, as incidents of the equitable ownership, limitations of interests not only not recognized by, but at variance with, the stricter rules of the Common law. Some instances of such equitable interests will be discussed hereafter.

The severance of the actual from the nominal ownership, coupled with the resolute ignoring on the part of the Common Law Courts of all else than the legal seisin, gave rise to great mischiefs, and to much contravention of the general policy of the law.

Origin of Uses. Mortmain (*u*).

One of the earliest instances, and possibly the origin, of the system of uses, was a device which was employed to evade the Statutes of Mortmain (*x*). The clergy, finding themselves incapacitated by these statutes from taking from pious benefactors direct grants of lands, had resort to the contrivance of having conveyances made to a third person "to the use of" or in "trust for" themselves. Though incapacitated from acquiring a legal ownership of the property, the clergy thus secured to themselves the enjoyment of it. In the particular instance of the clergy the device was crushed almost in its infancy by the Statute of Richard II., which enacted that for the future uses should be

(*t*) Elph. N. & C. Interp. 286, *et seq.*

(*u*) Kerly, Historical Sketch, 78. See also as to the origin and nature of uses, Digby, R. P., Part II., and Leake, Law of Prop. in Land, Part I., Ch. III., pp. 99, *et seq.*

(*x*) As to mortmain, see *ante*, p. 88.

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subject to the Statutes of Mortmain, and forfeitable like the lands themselves, unless a licence from the Crown to hold them were obtained (*y*). But the device thus invented by the clergy was adopted by laymen (*z*).

To avoid forfeiture for treason.

So, again, in the civil commotions which were rife in the earlier periods of English history, a wholesale forfeiture for treason was the general result of the success of one of the contending parties. Those, therefore, who took part in these struggles, would take the precaution of preventing the consequences of a forfeiture for treason, by conveying their lands to others, who would nevertheless hold them to their use, and were called "feoffees to uses."

To avoid burdens of tenure.

This mode of dealing with the land was also found a convenient way of avoiding the ordinary burdens of tenure, and sometimes, too, of defeating even the claims of execution creditors; for—

"The use being the creature of conscience, the offspring of moral obligation, could not be the subject of 'tenure'; it could yield no fruits, and owe no duties to the lord, it was not liable to forfeiture, nor susceptible of livery (*a*).

* * * * * *

"So ready a method of eluding the yoke of 'tenure,' could not but prove highly valuable to the people struggling with the narrow doctrines of the Common law, and groaning under the oppression of wardships, marriages, reliefs, escheats to the lord, escheats to the Crown on attainder, and other feudal inflictions—all of which were evaded by this subtle invention (*b*). * * * *

"As it neither required, nor admitted, of a conveyance, it might be disposed of by a secret contract, and even by word of mouth" (*c*).

To avoid claims of creditors.

"A use could not be extended (*d*) by writ of *elegit*, or other legal process, for the debts of *cestui que use*. For, being merely a creature of equity, the Common law, which looked no farther than to the person actually seised of the land, could award no process against it" (*e*).

Risks of beneficiary.

But on the other hand, the beneficiary was often exposed to the loss of his estate from causes over which he had no control. For—

"Originally it was held that the Chancery could give no relief but against the very person himself intrusted for *cestui que use*, and not against his heir or alienee. This was altered in the reign of Henry VI.,

(*y*) *Ante*, p. 91.

(*z*) As to the device of a feoffment to uses which enabled land to be devised, see pp. 392, 393.

(*a*) Hayes, Popular View of the Law of Real Property, 22.

(*b*) *Ib.* 29.

(*c*) *Ib.* 31; see Butler's note (sect. v. 11) to Co. Litt. 191 a.

(*d*) That is, taken in execution: as to *Elegit*, see *post*, p. 383.

(*e*) 2 Bl. 331.

with respect to the heir; and afterwards the same rule, by a parity of reason, was extended to such alienees as had purchased either without a valuable consideration or with an express notice of the use. But a purchaser for a valuable consideration, without notice, might hold the land discharged of any trust or confidence. And also it was held, that neither the king nor queen, on account of their dignity royal, nor any corporation aggregate, on account of its limited capacity, could be seised to any use but their own; that is, they might hold the lands, but were not compellable to execute the trust. And, if the feoffee to uses died without heir, or committed a forfeiture, or married, neither the lord who entered for his escheat or forfeiture, nor the husband who retained the possession as tenant by the curtesy, nor the wife who was assigned her dower, were liable to perform the use; because they were not parties to the trust, but came in by act of law: though doubtless their title in reason was no better than that of the heir" (*f*).

Consequent inconveniences.

Though uses had an equitable beginning, yet, "like all new models of general schemes of ordering of property," they introduced so many unforeseen inconveniences, that Lord Bacon complained that—

"This course of proceeding was turned to deceive many of their just and reasonable rights. A man, that had cause to sue for land, knew not against whom to bring his action, or who was the owner of it. The wife was defrauded of her thirds; the husband of his curtesy; the lord of his wardship, relief, heriot, and escheat; the creditor of his extent for debt; and the poor tenant of his lease" (*g*).

Partial remedies.

For some of the inconveniences pointed out partial remedies had, prior to the Statute of Uses, been afforded by particular statutes. Some of these allowed the lands to be attached by the creditors of the *cestui que use;* others allowed actions to be brought against him if in actual possession, that is, in the "pernancy," or enjoyment of the profits; and some made him liable to actions of waste, established conveyances and leases made with the concurrence of the feoffee, and gave to the lord the wardship of the heir (*h*).

These, however, were but partial and imperfect remedies; still their provisions all pointed to treating the *cestui que use* as the real owner of the estate; and a statute passed on the accession of King Richard III., furnished a hint for their extension, afterwards carried out by the Statute of Uses. King Richard, when Duke of Gloucester, had been a feoffee of lands to the use of other parties to a large extent, which lands, on his assumption of

(*f*) 2 Bl. 329.
(*g*) *Ib.* 331.
(*h*) *Ib.* 332.

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the Crown, he would (as the law was then understood) have been entitled to hold to himself discharged from the uses. To obviate this, an Act was passed, which ordained that where he had been so enfeoffed jointly with other persons, the lands should vest in the other feoffees, as if he had never been named; and that where he stood solely enfeoffed, the estate should vest in the *cestui que use*, in like manner as he had the use (*i*).

The latter provision furnished the principle for, and was more amply carried out by the celebrated Statute of Uses, which passed in the 27th year of the reign of Henry VIII., the object of which statute evidently was, by uniting the legal seisin or interest to the equitable or beneficial interest, entirely to abolish the doctrine of Uses and Trusts (*k*).

Statute of Uses.

By that statute, after reciting in the preamble (*l*) the various inconveniences pointed out above, it was enacted :—

> S. 1. "That where any person or persons stand or be seised, or at any time hereafter shall happen to be seised, of and in any honours, castles, manors, lands, tenements, rents, services, reversions, remainders, or other hereditaments, to the use, confidence, or trust of any other person or persons, or of any body politic, by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will, or otherwise, by any manner of means whatsoever it be, that in every such case all and every such person

(*i*) 2 Bl. 332; 1 Rich. III. c. 1; 1 Sanders on Uses, 23.

(*k*) 27 Hen. VIII. c. 10. See Tudor, L. C. R. P., notes to *Tyrrell's Case*, p. 340; Challis, R. P. 354.

(*l*) The preamble is as follows:— "Where by the Common Laws of this realm, lands, tenements, and hereditaments, be not devisable by testament, nor ought to be transferred from one to another but by solemn livery and seisin, matter of record, writing sufficient made *bond fide* without covin or fraud; yet, nevertheless, divers and sundry imaginations, subtle inventions, and practices have been used, whereby the hereditaments of this realm have been conveyed from one to another by fraudulent feoffments, fines, recoveries, and other assurances, craftily made to secret uses, intents, and trusts; and also by wills and testaments sometime made by *nude parolx*, and words, sometime by signs and tokens, and sometime by writing; and for the most part made by such persons as be visited with sickness, in their extreme agonies and pains, or at such time as they have had scantly any good memory or remembrance, at which times they being provoked by greedy covetous persons, lying in a wait about them, do many times dispose indiscreetly and unadvisedly their lands and inheritances; by reason whereof, and by occasion of which fraudulent feoffments, fines, recoveries, and other like assurances to uses, confidences, and trusts, divers and many heirs have been unjustly, at sundry times, disherited, the lords have lost their wards, marriages, reliefs, harriots, escheats, aids *pur fayre fitz chyvaler*, and *pur file maryer*, and scantly any person can be certainly assured of any lands by them purchased, nor know surely against whom they shall use their actions, or executions, for their rights, titles, and duties; also men married have lost their tenancies by the curtesie, women their dowers; manifest perjuries by trial of such secret wills,

Cestui que use to be seised for same estate as he had in the Use.

Estate and possession of person seised to be in *cestui que use.*

and persons and bodies politic, that have or hereafter shall have any such use, confidence, or trust in fee simple, fee tail, for term of life, or for years or otherwise, or any use, confidence, or trust in remainder, or reverter, shall from henceforth stand and be seised, deemed and adjudged in lawful seisin, estate, and possession, of and in the same honours, castles, manors, lands, tenements, rents, services, reversions, remainders, and hereditaments, with their appurtenances, to all intents, constructions, and purposes in the law, of and in such like estates, as they had or shall have in use, trust, or confidence, of or in the same; and that the estate, right, title, and possession, that was in such person or persons that were or shall be hereafter seised of any lands, tenements, or hereditaments to the use, confidence, or trust of any such person or persons, or of any body politic, be from henceforth clearly deemed and adjudged to be in him or them, that have or hereafter shall have such use, confidence, or trust, after such quality, manner, form, and condition as they had before in or to the use, confidence, or trust that was in them" (*m*).

The section has two effects; it not only provides that the *cestui que use* shall have the same estate in the land that he has in the use, but also divests the person who is seised to the use of a corresponding portion of his estate and vests it in the *cestui que use* (*n*).

Thus, under a feoffment to A. to the use of B., the statute enacts that B. shall have the seisin and possession, and then declares that A.'s legal estate and possession shall be deemed and taken to be in B. for such estate as B. had previously in the use (*o*).

"The statute," says Blackstone (*p*), "thus 'executes' the use; that is, it conveys the possession to the use, and transfers the use into possession: thereby making the *cestui que use* complete owner of the lands and tenements as well at law as in equity."

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and uses have been committed; the king's highness have lost the profits and advantages of the lands of persons attainted, and of the lands craftily put in feoffment to the uses of aliens born, and also the profits of waste for a year and a day of lands of felons attainted, and the lords their escheats thereof; and many other inconveniences have happened, and daily do increase among the king's subjects, to their great trouble and inquietness, to the utter subversion of the ancient common laws of this realm; for the extirping and extinguishment of all such subtle practised feoffments, fines, recoveries, abuses, and errors heretofore used and accustomed in this realm, to the subversion of the good and ancient laws of the same, and to the intent that the king's highness, or any other his subjects of this realm, shall not in any wise hereafter, by any means or inventions be deceived, damaged, or hurt by reason of such trusts, uses, or confidences."

(*m*) See Sanders on Uses, p. 69.

(*n*) See the operation of this section fully explained in Elph. Introd., pp. 7. *et seq.*

(*o*) Watkins, Conv. 231, note.

(*p*) Vol. ii. 333.

Construction of statute.

1. Applies only to one seised of real estate.

It will be observed that the statute, in defining the class of persons holding property to the use of other persons, speaks only of a person or persons "seised." Now "seisin" is an expression applicable only to real estate, and as to personalty, "possession" and not "seisin" is the appropriate and recognized expression (*q*). The statute was therefore, very early after its introduction, held to be applicable only to cases in which there was a person "seised," that is, holding an estate of freehold, whether for life or of inheritance; and consequently if A. was possessed of a term of years, held by him in trust for or for the use of B., the statute did not apply, and the term remained vested in A., notwithstanding the statute, in the same way as it would have done before it. And so, as there was strictly speaking no "seisin" of a copyholder, who is at Common law, apart from custom, merely a tenant at will, the statute did not apply to copyholds. But a person might stand seised of the freehold to the use of another for a chattel interest—as if A. B., being seised in fee, covenanted to stand seised to the use of C. D., for a term of years; this use would be executed by the statute (*r*).

2. And to the use of another.

It should also be pointed out, that the statute deals only with the case in which the legal seisin is in one person, and the use, or beneficial ownership, in another, not when they are united in the same person,—in the language of the statute, "where any person or persons stand or be seised, &c., to the use, &c., of *any other person*." Therefore, where a person is seised to his own use, the statute does not apply, but he is in by the Common law (*s*). But, even in this case, if the estate declared in his favour by the use is less than the estate which he takes at Common law, the uses are executed by the Statute (*t*). For example, if a feoffment (*u*) be made to A. and his heirs, to the use of A. and his heirs, A. is in at Common law, not by the Statute. But if the feoffment be to A. and his heirs to the use of A. for life, with remainder to B. in fee, both A. and B. are in by the Statute. And so, if the feoffment be to A. to the use of A. and B., both A. and B. are in under the Statute (*x*).

(*q*) See *ante*, p. 153, as to the wider meaning of "seisin" in ancient times.

(*r*) Watkins, Conv. 233.

(*s*) *Peacock* v. *Eastland*, L. R. 10 Eq. 17; *Orme's Case*, L. R. 8 C. P. 281; *post*, p. 291.

(*t*) Elph. N. & C. Interp. 268; Elph. Introd. 11.

(*u*) Any conveyance not operating under the Statute of Uses, see *post*, 373, would have the same effect.

(*x*) *Lowcock* v. *Overseers of Broughton*, 12 Q. B. D. 369.

Notwithstanding this, it is customary to convey "unto and to the use" of the grantee, for the following reasons, as expressed by Mr. Davidson :—

Conveyance "unto and to the use of" grantee.

"Where there is on the face of the conveyance a consideration expressed for it, a limitation to the purchaser and his heirs without any declaration of a use, will confer a fee simple; but before the Statute of Uses the rule was, that any conveyance made to another without any consideration or any declaration of a use, should be deemed to be made to the use of the party conveying; and it has been supposed that this rule has not been altered by the statute. In order to avoid any such construction, and to prevent the Statute of Uses from immediately undoing all that has been done, it is usual in every conveyance, and whether made for a consideration or not, to limit the land to the use of the purchaser, his heirs and assigns, or to such uses as he shall appoint, and in default of appointment to uses which practically vest the fee simple in him" (*y*).

The statute enabled a man to convey to himself a freehold in severalty or in joint tenancy, or to convey to his wife (which at Common law, she being considered one person with him, he could not do), and a wife to convey to her husband; this is effected by conveying to another person to the use of the person or persons intended to take, *e.g.*, where an owner in fee simple settles land upon himself for life, or where a surviving trustee conveys the trust estate to a new trustee jointly with himself.

Conveyance by a man to the use of himself, &c.

"The interposition of a stranger as a grantee to uses enables a man to convey a freehold estate to himself or his wife, and a wife to convey a freehold estate to her husband; whereas, previously to the Statute of Uses, in consequence of the rule of the Common law, that a man cannot take an estate by his own conveyance—*i.e.*, unite the opposite characters of grantor and grantee, two conveyances would have been necessary. It would have been requisite for him to convey to a third person, and for that third person to reconvey it to him: a method which, prior to the Act 22 & 23 Vict. c. 35, s. 21, was necessarily adopted under similar circumstances with respect to leasehold estates, since they are not affected by the Statute of Uses. The practical benefit thus derived from the Statute of Uses is seen in the familiar instances of a man settling his own freehold on himself for life or in tail, and of a surviving trustee limiting the estate to the use of himself and new trustees" (*z*).

It is provided by the Conveyancing and Law of Property Act, 1881 (*a*), that freehold land (*b*) may, by a conveyance made after

Conveyancing Act, 1881.

(*y*) 2 Dav. Prec., Part I., 182.
(*z*) *Ib.* 184.
(*a*) 44 & 45 Vict. c. 41, s. 50.
(*b*) Chattels real were made assignable by one person to another jointly with himself, by the Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), s. 21.

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31st December, 1881, "be conveyed by a person to himself jointly with another person by the like means by which it might be conveyed by him to another person; and may in like manner be conveyed by a husband to his wife, and by a wife to her husband, alone or jointly with another person."

3. And use co-extensive with estate of grantee to uses.

—*Scintilla juris.*

The *cestui que use* cannot have an estate in the use more extensive than the seisin out of which it is raised. Thus, if land be conveyed to A. for life, to the use of B. for life, in tail, or in fee, the estate of B. must determine upon the death of A. (*c*) Hence arose much controversy on the question out of what seisin contingent uses were in certain cases to be executed; as, for instance, where there was a conveyance to A. and his heirs to the use of the settlor and his heirs till an intended marriage, and after that marriage to other uses, *e.g.*, to the use of his son for life with remainders over. In such a case the use until the marriage is co-extensive with the seisin of A., the grantee to uses, and is executed by the statute, and so it would seem that no seisin could remain in him after the marriage; it was said, however, that the original seisin reverted to him for the purpose of serving the secondary uses, and that before such event this possibility of reverter of the original seisin should be considered as a "possibility of seisin" or *scintilla juris* (*d*). Others held that the seisin to serve the contingent uses was *in nubibus*, or *in custodiâ legis*. Lord St. Leonards advocated the opinion that the contingent uses took effect as they arose, by force of and relation to the seisin of the grantee to uses—the estates opened and let in the contingent uses as they came *in esse* (*e*). This last view was adopted in the Law of Property Amendment Act, 1860 (commonly called Lord St. Leonards' Act) (*f*), which enacted:—

> S. 7. "Where by any instrument any hereditaments have been or shall be limited to uses, all uses thereunder, whether expressed or implied by law, and whether immediate or future, or contingent or executory, or to be declared under any power therein contained, shall take effect when and as they arise by force of and by relation to the estate and seisin originally vested in the person seised to the uses; and the continued existence in him or elsewhere of any seisin to uses or *scintilla juris* shall not be deemed necessary for the support

(*c*) Sanders on Uses, p. 107; Elph. N. & C. Interp. 270 (Rule 101); Elph. Introd. 8.

(*d*) Sanders on Uses, p. 108.

(*e*) Sugd. on Pow., Ch. I., s. 1, 29.

(*f*) 23 & 24 Vict. c. 38.

of or to give effect to future or contingent or executory uses, nor shall any such seisin to uses or *scintilla juris* be deemed to be suspended, or to remain or to subsist in him or elsewhere."

Object of Statute of Uses defeated.

We have seen how entirely the object of the statute *De Donis* was ultimately defeated by legal construction (*g*). So, although the design of the Statute of Uses was to put an end to the system of severance of the beneficial from the legal ownership, and to unite the two in the same person—virtually to abolish uses by turning them into legal estates—to "marry" the use indissolubly to the land, and thus restore in effect the singleness and simplicity of the Common law (*h*), this design was frustrated by legal ingenuity sanctioned by judicial decision.

Statute does not apply to a use upon a use.

The statute, it has been observed, applied only to the case in which one person was seised to the use of another; and in that case it declared that the person who had the use, should be deemed to be "in lawful seisin, estate, and possession," of the lands. The contrivance resorted to in order, notwithstanding the statute, to create a beneficial interest apart from the legal estate, was to make a conveyance of the lands to one person to the use of another, and then to go on to declare that that other should hold it "upon trust" for the person who was to take the beneficial interest. Thus the property was conveyed to A. to the use of B. in trust for C. Under this arrangement A. played the part of what was termed a "conduit-pipe," that is, was a person momentarily only receiving the seisin; this seisin, at the same instant of time, the statute withdrew from him and transferred to B. Having thus transferred the seisin to B., according to the construction, shortly after the passing of the statute, put by the Courts on the statute, it left it there; yet B., when he got the estate himself, held it in trust for C. This trust, however, for C., was not considered as being the trust or use on which A. held the lands. The Court adhered to the literal terms of the statute, which only executed the use to which one person was seised for another, and in the instance in question the use to which A. was seised was for B., and not for C.

The foundation of this doctrine was, that there could not be a use upon a use, which it was said would have been the result had the statute executed the double use, namely, first that

(*g*) *Ante*, p. 65, *et seq.*

(*h*) Hayes' Popular View of Law of Real Property, 32.

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to B., and then that to C., instead of confining its effect to the use to B. (*i*)

Thus, says Mr. Hayes (*k*) :—

"It was found that, by a very ready process, the legal estate might be separated from the equitable or beneficial right as before. The things remained: the terms only were changed. The primary use,' on which the statute did operate, retained, along with its new character of a legal estate, its ancient appellation of a 'use;' the secondary use, on which the statute did not operate, was called, for distinction's sake, a 'trust.' As the 'use' became, henceforth, by the effect of the statute, essentially the legal estate in the land, it ceased to be the creature of equity, and fell under the ordinary cognizance of the Courts of Common Law."

Statute does not apply when active duties to be performed.

While the Courts thus refused to extend the operation of the statute beyond the first use of a series, they at the same time refused to apply the statute to cases in which a person was seised to a use or upon a trust which required some active duty to be discharged in favour of some other person. Thus, where lands were conveyed to A., upon trust to recover and receive the rents, and then pay them over to B.; here, inasmuch as the active duty of receipt was cast upon A., the Court left him clothed with the legal estate, for, it said, the lands must remain in the trustee to enable him to perform the trust; but had the trust in A. been to "permit the rents to be received" by B., the result would have been the other way. In the latter case, the use would have been executed in B. (*l*)

Executory limitations.

The only future estates known to the Common law are remainders and reversions, and it will be remembered that the following conditions are necessary to the validity of a remainder:—(1) it must be supported by a particular estate of freehold: (2) it must take effect in possession at the instant when the particular estate determines; but it cannot take effect in defeasance of, or at a time not coincident with the determination of, the particular estate; (3) it cannot be limited to take effect on the determination of an estate in fee simple. Before the Statute of Uses a future use (as distinguished from a Common law estate) was subject to none of these conditions; and therefore, as the statute did not alter the nature of a use, but merely clothed the

(*i*) *Tyrrell's Case*, Dyer, 155 a; and Tudor, L. C. R. P. 335.

(*k*) Popular View of Law of Real Property, p. 36.

(*l*) Elph. N. & C. Interp. 271 (Rule 102 and examples there given). See *Re Lashmar*, [1891] 1 Ch. 258.

use with the legal estate, it became possible after the statute, by means of a declaration of uses, to create a future legal estate without conforming to the conditions essential to the validity of a remainder at Common law. The limitations thus introduced are called "executory uses" and are divided into "springing" and "shifting" uses.

"Executory Uses."

At Common law the land itself, *i.e.*, the legal estate in it, could not be devised, but, before the Statute of Uses, the Court of Chancery gave effect to the devise of the use, where a feoffment had been made to the uses of the feoffor's will. The Statute of Uses prevented this from being done, for the effect of the feoffment was to raise a resulting use in favour of the feoffor, so that by virtue of the statute he took back the legal estate. But the Statute of Wills (*m*) enabled the land itself (*i.e.*, the legal estate), to be devised; and it was held that the land might be devised and future estates created by will with the same disregard for the rules of Common law as in a disposition of the use by an instrument *inter vivos*. Devises of this nature taking effect in derogation of the rules of Common law are called "Executory Devises" (*n*). With an exception that will afterwards be pointed out, executory uses and executory devises are subject to the same rules, and they are therefore sometimes grouped together under the name of "Executory Limitations" (*o*).

Executory devises.

It should be observed that if a limitation can possibly take effect as a remainder according to the rules of Common law, it will not be construed as an executory limitation, even if the consequence be that it will fail to take effect owing to the rules as to destruction of contingent remainders (*p*).

Shifting and springing uses must be distinguished, and executory devises may conveniently be distinguished into similar

(*m*) 32 Hen. VIII. c. 1.

(*n*) The term "executory devise" properly indicates the mode in which the interest is created; but it is commonly used to indicate the interest itself. See Challis, R. P. 65, 66. Perhaps the earliest instance of an executory devise occurred in the case of directions given by testators that their executors should sell their tenements; *Farington* v. *Dart*, Y. B., 9 Hen. VI., at 24 b.

(*o*) An executory use or devise which is intended to defeat an estate in fee simple by altering the course of devolution, and which is to take effect at the moment of devolution and at no other time, is void; and again an executory use or devise which is to defeat an estate, and to take effect on the exercise of any right attached to that estate, is void; *Shaw* v. *Ford*, 7 Ch. Div. 669.

(*p*) Challis, R. P. 112, 113. See *per* Jessel, M.R., *Re Lechmere and Lloyd*, 18 Ch. Div. 524, 529; *Dean* v. *Dean*, [1891] 3 Ch. 150; and *Symes* v. *Symes*, [1896] 1 Ch. 272. *Ante*, p. 244.

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classes, though it is perhaps not very usual so to distinguish them (*q*).

Shifting use.

Where there is a limitation by way of use of a freehold estate, followed in the same deed by a limitation of a use which cuts short that estate, the latter use is called a shifting use.

Where the first limitation is of a determinable fee simple, a use to arise on its determination is also called a shifting use.

"Name and arms clause."

Shifting uses occur constantly in strict settlements of land (*r*). An example of a shifting use will be found in one form of the "name and arms" clause. Suppose that the limitations are "to the use of A. for life with remainder to the use of his sons successively according to seniority in tail," the clause in question directs A. and his sons to take a certain name and bear certain arms, followed by a direction that if this is not done the land shall go to certain other uses; in this case, if A. does not take the prescribed name, the use to him during his life ceases, and the new use takes effect in defeasance of his estate (*s*). In like manner, if there be a devise of land to A. in fee simple, but, if A. dies under twenty-one, to B. in fee simple, on A.'s death under twenty-one the estate of B. takes effect in defeasance of A.'s estate.

Another example of a shifting use is afforded by the common limitations in a marriage settlement "to the use of A. (the settlor) in fee simple until the intended marriage, and after the marriage to the use of A. for life" (with remainders over). Here A. takes a fee simple determinable on marriage, and upon that event, the uses to A. for life and the subsequent uses take effect.

It will be observed that shifting uses and devises are conditional limitations (*t*).

Springing use.

Springing uses are limitations of the use for a freehold interest, to take effect either upon a contingency or after the lapse of a fixed period, which, if they had been legal limitations arising at Common law, would have been void as attempts to create a freehold *in futuro*.

The discussion of springing uses created by deeds is perhaps

(*q*) There is some discrepancy in the terminology used by different writers. See Gray on Perpetuities, § 54.

(*r*) See Butler's note, Co. Litt. 327 a.

(*s*) See form of the clause in 2 K. & E. 555.

(*t*) See *ante*, p. 190.

too difficult for a student. The learned editor of Fearne (*u*), Mr. Challis (*x*), and Professor Gray (*y*), are of opinion that some of the decisions are erroneous.

Springing devise.

An example of a springing devise is afforded by a devise to A. when he shall attain twenty-one years of age; or to the children of B., where B. has no child living at the death of the testator (*z*). Such limitations would be void, if construed as contingent remainders, for want of a particular estate of freehold to support them.

So, if there be an interval between two successive limitations, as where lands are devised to A. for life, and, at the expiration of one year from his death, to B.

In these cases the seisin is held to be in the testator's heir or residuary devisee, and not in abeyance (*a*).

40 & 41 Vict. c. 33.

The reader is now in a position to understand the meaning of the Contingent Remainders Act, 1877 (*b*), which makes a contingent remainder (created by any instrument executed, or any will or codicil revived or republished after 2nd August, 1877), which would have been good as a springing or shifting use or executory devise, if it had not had a sufficient estate to support it as a remainder, capable of taking effect as a springing or shifting use or executory devise. Suppose, for example, that the limitations be to the use of A. during his life, with remainder to the use of such of his children as attain twenty-one. It will be observed that this is a contingent remainder to the children which would fail as a remainder in case no child had attained twenty-one at A.'s death. The effect of the Act is that in this case the gift to the children takes effect by way of springing use.

Executory bequests of chattels.

There is a class of executory devises, or rather bequests, that has no analogy in uses, namely, where a term of years or other

(*u*) Fearne, C. R. 41.

(*x*) 1 L. Q. R. 412.

(*y*) Perpetuities, 38, *et seq.*

(*z*) So where the devise is to such children of A. living at her death, as *either before or after her death* should attain twenty-one; *Re Lechmere and Lloyd*, 18 Ch. Div. 524; for "where the gift is to a class which can by no possibility be ascertained at the determination of the preceding estate of freehold, the class can only take on the footing of its being an executory devise;" *per* Jessel, M.R., *ib.*, p. 528. See also *Miles* v. *Jarvis*, 24 Ch. Div. 633, where the devise was to A. for life, and after her decease to all the children of B. living at the decease of A. or thereafter to be born; and this was held to be an executory devise, under which children born after the death of A. were entitled to share with those born before A.'s death.

(*a*) Fearne, C. R. 544.

(*b*) 40 & 41 Vict. c. 33, *ante*, p. 245.

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chattel is bequeathed to one for life, or otherwise, and after the death of the legatee, or the happening of a contingency, is given to someone else. Such a gift is void at law when contained in conveyances *inter vivos*, and, as uses cannot be declared of a chattel, such a gift could not be created by means of uses, but it is good when contained in a will (*c*): the whole term vests in the tenant for life and on his death shifts to the remainderman.

Alienation.

Executory uses or devises were formerly, to the same extent as contingent remainders, incapable of alienation, because they were regarded as not being "estates" but only possibilities of having estates at a future time (*d*). Now they can be disposed of by deed (*e*), and devised (*f*).

Period within which estate must arise.

In order to guard against the mischiefs of a perpetuity, the law has prescribed a limit of time within which executory interests must take effect. This limit was finally settled in a case before the House of Lords in 1833 (*g*). There the following question was put by the Lords to the Judges:—

> "Whether a limitation by way of executory devise is void, as too remote, or otherwise, if it is not to take effect until after the determination of one or more life or lives in being, and upon the expiration of a term of twenty-one years afterwards as a term in gross, and without reference to the infancy of any person who is to take under such limitations, or of any other person?"

The Judges answered that such a limitation is not too remote or otherwise void. And they added that a further period for gestation was to be allowed in those cases only in which the gestation exists.

When period begins.

The time from which the period allowed by the rule begins to run is, for an executory use, the date of the deed, and for an executory devise the death of the testator (*h*).

Possible, not actual, events considered;

The validity of an executory devise with respect to the rule against perpetuities is determined at the death of the testator; and, in the case of all executory limitations, possible, and not actual, events are alone considered (*i*). Consequently, no limi-

(*c*) Fearne, C. R. 401; *Manning's Case*, 8 Rep. 94 b.

(*d*) Challis, R. P. 164, citing Viner, Abr. 462, Possibility, B., pl. 5.

(*e*) Real Prop. Act, 1845 (8 & 9 Vict. c. 106), s. 6.

(*f*) Wills Act, 1837 (7 Will. IV. & 1 Vict. c. 26), s. 3.

(*g*) *Cadell* v. *Palmer*, 1 Cl. & F. 372; and Tudor, L. C. R. P. 424. *Ante*, p. 102.

(*h*) Tudor, L. C. R. P. 465.

(*i*) *Jee* v. *Audley*, 1 Cox, 324.

—failure of issue.

tation is good unless it must necessarily take effect within the period allowed by the rule (*k*). Suppose, for instance, there be a gift to A. and his heirs, with a limitation over, on the failure of the issue of B., to C. and his heirs; now, it is evident that, though the issue of B. may fail in the lifetime of A., it possibly may not fail for centuries; and during that period the property would be inalienable, inasmuch as A. or his heirs cannot bar or destroy the interest limited to C., as it is an executory devise. If, therefore, the failure of issue be taken to mean a failure of issue at any time, however distant, the limitation would be void as too remote. Many difficult questions have arisen as to whether words importing a failure of issue mean a general failure of issue or a failure of issue at the death of the person from whom they descend (*l*). These questions are for the most part got rid of by the provisions of the Wills Act, 1837 (*m*), that, in devises, words which may import either failure of issue of any person in his lifetime, or at his death, or an indefinite failure of his issue, shall be construed to mean a failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will (*n*). But the rule against perpetuities is applicable only to such executory limitations as are limited on estates in fee simple or terms for years; for, speaking generally, no period is too remote for the limitation of an executory interest engrafted on an estate tail previously limited. Thus, if lands be limited to A. in fee simple, or for years, and if A. should have no child who attains the age of twenty-seven years, to B., in this case the limitation to B. is void for remoteness; but if land be limited to A. in tail, and if A. should have no child who attains the age of twenty-seven years, to B., the limitation to B. is good. The reason is, that, where an executory limitation is engrafted on an estate tail, it is always liable to be barred by the tenant in tail, and therefore the remoteness of the event on which it depends does not suspend the absolute ownership of the property so as to create a perpetuity (*o*).

Limitation after an estate tail.

Where a limitation is void as being too remote, any subsequent limitations are not thereby accelerated, but are void also (*p*).

Effect of remoteness.

(*k*) Notes to *Cadell* v. *Palmer*, Tudor, L. C. R. P. 465; *Dungannon* v. *Smith*, 12 Cl. & F. 546; *ante*, 105, note (*x*).

(*l*) See *Forth* v. *Chapman*, Tudor, L. C. R. P. 682.

(*m*) 7 Will. IV. & 1 Vict. c. 26, s. 29.

(*n*) See *post*, p. 289, and Ch. XV.

(*o*) Fearne, C. R., note by Butler, 522.

(*p*) Notes to *Cadell* v. *Palmer*, Tudor, L. C. 489.

Example of void devise.

A good instance of an executory devise void for remoteness is to be found in the following case (*q*). A testator gave his real and personal estate to trustees upon trust for his wife during widowhood, and after her death or second marriage, for his children who might be living at such death or second marriage, and the issue of any child who might have previously died, such issue to take the share of his or her deceased parent in equal shares; the shares of such of his children or grandchildren as should be a son or sons to become vested in and payable to them as and when he or they should respectively attain the age of twenty-four years, and the shares of his daughters or the female issue of any deceased child to be settled as therein mentioned. It was held by Jessel, M.R., that the whole of the gifts after the life interest of the widow were void for remoteness, because the class of objects whom the testator meant to benefit were not necessarily ascertainable within the limit allowed by the rule against perpetuities; for "a child might die in the lifetime of the widow, or before her second marriage, leaving a son under the age of one year; the widow might then die, or marry, and such son might not attain twenty-four years of age within the legal period."

The vice of remoteness affects a class as a whole, if it may affect an unascertainable number of its members (*r*).

Devise upon event which does not precisely happen.

An executory devise limited to arise upon the failure of a prior interest may take effect, although the failure has not happened in the particular mode anticipated by the testator: for it is considered that the testator's intention was that the ulterior gift should take effect at all events upon the failure of the prior one. Thus, A. bequeathed a term for years to his wife for life, and after her death to the child she was then *enceinte* with, but if such child died before twenty-one, then he bequeathed one third part of the said term to his wife. The wife not being *enceinte* at the time of the devise, it was held that the devise of the third part to her was good, though the contingency never happened (*s*).

(*q*) *Hale* v. *Hale*, 3 Ch. Div. 643. But if there are alternative limitations which are capable of being separately regarded, the devise may be valid in one event; though it would be invalid in the other; see *Watson* v. *Young*, 28 Ch. Div. 436; and *Re Harvey*, *Peck* v. *Savory*, 39 Ch. Div. 289.

(*r*) *Pearks* v. *Moseley*, 5 App. Cas. 714.

(*s*) *Jones* v. *Westcomb*, Prec. Ch. 316; S. C., Tudor, L. C. R. P. 869; and see the notes. "If the precedent limitation, by what means soever, is out of the case, the subsequent limitation takes effect;"

Restriction on executory limitations on failure of issue (Conveyancing Act, 1882).

By the Conveyancing Act, 1882 (*t*), a restriction has been placed on the effect of executory limitations contained in any instrument coming into operation after 1882, by providing that—

> "Where there is a person entitled to land for an estate in fee, or for a term of years absolute or determinable on life, or for a term of life, with an executory limitation over on default or failure of any of his issue, whether within any specified period or time or not, that executory limitation shall be or become void and incapable of taking effect, if and as soon as there is living any issue who has attained the age of twenty-one years of the class on default or failure whereof the limitation over was to take effect."

Thus, the settlement is put an end to at a point of time corresponding, as nearly as may be, with that at which, if the land were entailed, the entail could be barred. Hitherto, where there is, for instance, a limitation to A. and his heirs, but if he shall die without leaving issue living at his death, then over, the land has been unsaleable during the life of A., except with the concurrence of persons not ordinarily likely to concur. Alienation is thus facilitated by this enactment.

Trusts.

The practical result of the construction put by the Courts of law on the Statute of Uses (*u*), was to restore to the Court of Chancery its ancient jurisdiction over beneficial ownership as distinguished from legal estates; the doctrine of uses was revived under the denomination of "trusts." That Court held that uses which the statute could not execute were still "trusts" in equity, which in conscience ought to be performed. And so in the end the Statute of Uses, instead of withdrawing trusts from the control of the Court of Chancery, brought them even more fully within its operation.

Creation and assignment of trusts.

Before the Statute of Frauds, a trust of lands might have been created by mere oral direction. That statute, however, enacted:—

Statute of Frauds, s. 7.

> S. 7. "That all declarations or creations of trusts or confidences of any lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect" (*x*).

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per Lord Hardwicke, in *Avelyn* v. *Ward*, 1 Ves. Sen. 420. See *Murray* v. *Jones*, 2 V. & B. 313, and for recent cases, *Davies* v. *Davies*, 30 W. R. 918; *Re Treducell*, [1891] 2 Ch. 640; *Re Akeroyd's Settlement*, [1893] 3 Ch. 363. See this applied to a marriage settlement, where there was a gift over if all the children should die; there was never any child; yet it was held that the gift over took effect; *Osborn* v. *Bellman*, 2 Giff. 593.

(*t*) 45 & 46 Vict. c. 39, s. 10.

(*u*) *Ante*, pp. 281, 282.

(*x*) 29 Car. II. c. 3, s 7. See 1 Cruise,

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Trusts arising upon any conveyance of land "by implication or construction of law," or trusts "transferred or extinguished by an act or operation of law," are expressly excepted from the statute (*y*). A trust falling within the exception would be such, for example, as the law would imply on the purchase of property by one in the name of another, in favour of him who paid the money. So a mortgagee, after satisfaction of his mortgage, would by implication be a trustee for the mortgagor.

Assignment of trusts.

It was further enacted by the same statute:—

> S. 9. "That all grants and assignments of any trust or confidence shall likewise be in writing signed by the party granting or assigning the same, or by such last will or devise, or else shall likewise be utterly void and of none effect."

This section, it will be observed, extends to trusts of personalty.

There is no particular form required for a declaration or creation of a trust; a mere request or recommendation, if the subject and object thereof be precisely stated, may create a trust (*z*).

Present distinction between Uses and Trusts.

It will appear from what has been said that since the Statute of Uses, and under the construction respecting the execution of the use put upon the statute, uses and trusts have branched out into two different classes.

First. A limitation of a freehold estate in land to one to the use of another vests the legal estate in the *cestui que use*, and the result is the same if the word "trust" be substituted for the word "use;" for example, a limitation to A. "in trust for" B. (*a*)

Secondly. Where a legal estate, either of freehold or less than freehold, is vested in one, and a trust is engrafted on that estate, the trustee retains the legal estate and the trust is altogether different from the use,—as in the case of a gift to A. to the use of B. in trust for C., or unto and to the use of A. in trust for B. It should be noticed that, although, where the limitation is "unto and to the use of A., in trust for B." (*i.e.*, "to A. to the

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Dig. 392. Where the legal estate is vested in a trustee for an absolute beneficial owner, the latter, and not the trustee, is the person who is by law enabled to declare the trust; *Tierney* v. *Wood*, 19 Beav. 330, followed in *Kronheim* v. *Johnson*, 7 Ch. Div. 60. See *Dye* v. *Dye*, 13 Q. B. D. 147.

(*y*) 29 Car. II. c. 3, s. 8; 1 Cruise, Dig. 391.

(*z*) Notes to *Tyrrell's Case*, Tudor, L. C. R. P. 366, referring to *Harding* v. *Glyn*, 2 W. & T.

(*a*) See the words of the Statute of Uses, *ante*, p. 276, "to the use, confidence, or trust."

use of A. in trust for B."), A. takes by the Common law, not by the statute (*b*), still, as the use is limited to A., it is clear that he is not seised to the use of B., so that the trust for B. is not executed by the statute, and B. takes an equitable estate only.

Trusts are divided into—(1) "active" and "passive;" (2) "executed" and "executory." Trusts. 1. Active—Passive.

An active trust is, as we have seen, one involving the discharge of some active duty on the part of the trustee. Thus, a trust to raise money by sale or mortgage of lands; a trust to keep up an almshouse out of the rents and profits of property; or a trust to receive and accumulate the income of property for a given period, and at the expiration of the period to apply the accumulations, are active trusts. On the other hand, a trust to permit A. B. to receive the rents and profits of property, or, to allow a dwelling-house to be occupied by C. D., would be passive trusts. In the former instances the active interference of the trustee is necessary. In the latter he has only to remain passive, and allow the property to be enjoyed in the manner indicated by the author of the trust.

An executed trust is where the trust is complete in its creation, and the beneficial interests created under it are defined by the instrument creating the trust and are final; in other words, when no act is necessary to be done to give effect to them, the declaration of trust being originally complete (*c*). Thus, where there is a conveyance unto and to the use of A. and his heirs, upon trust for B., for his life, with remainder to C. in fee, the interests to be taken by B. and C. under the trust are defined by the conveyance itself, and nothing further has to be done. 2. Executed—Executory.

An executory trust, on the other hand, requires something further to be done to give it complete and final effect,—some further act by the author of the trust or the trustees, to give effect to it, as in the case of marriage articles (*i.e.*, an agreement made before marriage to make a marriage settlement), and as in the case of a will where property is vested in trustees in trust to settle or convey in a more perfect and accurate manner (*d*).

(*b*) *Ante*, p. 278. *Meredith* v. *Jones*, Cro. Car. 244; *Doe* d. *Lloyd* v. *Passingham*, 6 B. & C. 305.

(*c*) 1 W. & T. 18, notes to *Lord Glenorchy* v. *Bosville*, and see Elph. N. & C. Interp. 532.

(*d*) *Ib.*, and see *per* M.R. in *Miles* v. *Harford*, 12 Ch. Div. 699.

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Thus, if property be devised to trustees upon trust to pay the rents and profits to the devisor's daughter for life, and, in the event of her marriage, to make a settlement of it upon her and her children; in this case the trusts for the daughter and her children in the event of her marriage are executory, requiring something further to be executed, namely the settlement, in order more accurately to define them.

In cases of executed trusts, a Court of Equity will construe the limitations in the same manner as similar legal limitations (*e*), for there the author of the trust does not suppose any other conveyance will be made; but in cases of executory trusts, where something is left to be done, it will not construe technical expressions with legal strictness, but will mould the trusts according to the intent of those who create them (*f*).

3. Express—Implied.

Again, trusts may be either express or implied. An express trust is where by the instrument creating it, or some other instrument forming part of the same transaction, the trusts on which the property is to be holden are expressly set forth.

An implied trust is where there is no express declaration of trust, but constructive or resulting trusts arise by implication of law.

Trustees. Crown or Corporation.

Neither the Crown nor a corporation aggregate, could, prior to the Statute of Uses, be seised to uses. Thus, for example, if lands were conveyed to the king to the use of a subject, or to a corporation to the use of a charity; in the former case the king, and, in the latter case the corporation, would hold discharged of the use, and for their own benefit. It is different, however, in respect to the modern trust in the case of a corporation (*g*), but though the Crown may hold as trustee, the trust cannot be enforced against it (*h*). Instances more frequently occur in relation to corporations where, property having been given to them for charitable purposes, their administration of it is called into question. The reason that a corporation could not stand seised to a use was, that the writ of *subpœna* did not issue against it to compel the performance of the trust; a reason which has ceased to operate (*i*).

(*e*) Elph. N. & C. Interp. 276; *Re Whiston*, [1894] 1 Ch. 661.

(*f*) 1 W. & T. 19; Elph. N. & C. Interp. 531.

(*g*) 1 Sanders on Uses, 56, 87, and 389; Lewin, p. 29.

(*h*) *Paulett* v. *Att.-Gen.*, Hard. 465; Chitty, Prerog. 378; 1 Cruise, Dig. 403; Lewin, 28.

(*i*) 1 Sanders on Uses, 87; Lewin, 2.

Alienation and devolution of trust estate.

At law the legal estate vested in trustees is capable of alienation by them in their lifetime, though they might in equity be restrained from making any alienation not authorized by the trust, and, until recently, a legal estate vested in a sole trustee might be devised by his will, or, in the absence of testamentary disposition, devolved on his heir.

The Vendor and Purchaser Act, 1874 (*k*), provided that—

"Upon the death of a bare trustee (*l*) of any corporeal or incorporeal hereditament of which such trustee was seised in fee simple, such hereditament shall vest like a chattel real in the legal personal representative of such trustee."

This section was repealed as to England on and after the 1st January, 1876, by the Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 48, except as to anything done thereunder before that date. By the same section the provisions of the repealed section were re-enacted with the insertion of the word "intestate" after "bare trustee," and the section as re-enacted was not to apply to land registered under the Act.

Both these sections were repealed by the Conveyancing and Law of Property Act, 1881 (*m*), which provides that in case of death after the 31st December, 1881, where an estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments, is vested on any trust (or by way of mortgage) in any person solely, the same shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives in like manner as if the same were a chattel real. This section has been repealed with respect to a trustee or mortgagee who has been admitted to copyhold or customary hold land (*n*).

(*k*) 37 & 38 Vict. c. 78, s. 5.

(*l*) Great difficulty has been felt as to the meaning of a "bare trustee,"—"A difficulty so great," said Jessel, M.R., "that persons of great knowledge and learning, who have paid particular attention to the subject, entertain some doubt as to its meaning" (see *Morgan* v. *Swansea Urban Sanitary Authority*, 9 Ch. Div. 584; *Christie* v. *Orington*, 1 Ch. Div. 279 (Hall, V.-C.). See *Re Cunningham and Frayling*, [1891] 2 Ch. 567, where Stirling, J., followed the opinion of Hall, V.-C., in preference to that of Jessel, M.R.). The expression also occurs in the Fines and Recoveries Act (3 & 4 Will. IV. c. 74, s. 31), and in the Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137, s. 50), and in the Vendor and Purchaser Act, 1874, s. 6, which renders the concurrence of the husband unnecessary to the conveyance by a married woman as "bare trustee;" see *Re Docwra*, 29 Ch. Div. 693; Dart, V. & P. 587.

(*m*) 44 & 45 Vict. c. 41, s. 30.

(*n*) *Ante*, p. 210.

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Who are bound by the trust (*o*).

Purchaser for value without notice.

The trust estate is, as regards all persons taking the property, even for valuable consideration, *with notice* of the trust, and, as regards persons taking as volunteers, even without notice, and in all cases of succession by representatives, subject in equity to the trust. If, however, a trustee convey the estate for value to a person who had no notice of the trust, the trust itself may be defeated. The legal estate would prevail at law, upon the principles already explained; and the Courts of Equity have declined to interfere when, the equity of the beneficiary and that of the purchaser being, as it is said, equal, the latter had obtained the advantage of the legal estate (*p*). Hence, the necessity insisted on in conveyancing of "getting in," as it is termed, the legal estate (*q*).

Notice.
1. Actual.
2. Constructive.

But a Court of Equity would not so decline to interfere if the alienee had knowledge, technically termed "notice," of the trust. Such notice may be either actual or constructive; under either of which fraud will in equity be imputed to the purchaser; so that, as will be seen from what follows, the purchaser may be in fact wholly innocent, and yet in equity will be accounted party to the fraud.

"If A., having signed a contract for the sale of land to B., but not having conveyed it to him, afterwards sells and conveys it to C., who, at the time of his purchase, is distinctly apprised of the previous sale, C. is said to have '*actual* notice' of the equitable right of B. 'Actual notice,' therefore, is clear direct intimation of the fact. But if C. had obtained merely a knowledge of some fact or circumstance (as B.'s possession of the land, or the exercise by him of an act of ownership), which, if investigated or pursued, would have conducted him (C.), either immediately, or through a long train of facts and circumstances, to a knowledge of the contract with B., then C. is said to have '*constructive* notice' of the equitable right of B. And if the attorney or agent employed by C. to negotiate his purchase, receive in the course of the negotiation, either actual or constructive notice, the effect is the same upon the conscience of C., although the agent should never communicate his information, as if C. were personally in the secret. Thus 'constructive notice' to an agent is constructively imputed to the principal.

"To acquire land with 'notice' whether actual or constructive, of the right of another, is, in the eye of equity, to acquire it dishonestly. A., in the case above supposed, is guilty of a breach of trust, to which C. is accessory. If C., having thus bought with knowledge of the trust, resell and convey the land to D., without communicating that knowledge, D. cannot be compelled to restore the land, but B. has his remedy in equity against both A. and C. to compel them to make good the loss which he has sustained" (*r*).

(*o*) See Lewis, 260, 977.

(*p*) 1 Sanders on Uses, 348, *et seq.*

(*q*) See *ante*, pp. 216, 217.

(*r*) Hayes' Popular View of Law of

Conveyancing Act, 1882.

By the Conveyancing Act, 1882 (*s*), an attempt is made to express with certainty the law of constructive notice, which has hitherto had to be extracted from the numerous decided cases.

The ordinary jurisdiction of a Court of Equity suffices to call trustees to account, to compel their execution of the trusts, to control their administration of them, and to deal with the legal estate according to the direction of the Court.

Power to appoint new trustees.

Owing to the risk of the trustees dying, or becoming unable to act before all the objects of the trusts are satisfied, it used to be the practice, which is still occasionally followed, to insert in any instrument creating a trust a power to some person to appoint new trustees. This power is now usually omitted in reliance on statutory provisions enabling the appointment to be made (*t*).

Trustee Acts.

The Trustee Act, 1893 (*u*) repealing and in substance re-enacting the Trustee Act, 1850, and the Trustee Act, 1852 (*x*) with additions, provides that:—

> S. 25. (1) "The High Court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult, or impracticable so to do without the assistance of the Court, make an order for the appointment of a new trustee or new trustees, either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee. In particular, and without prejudice to the generality of the foregoing provision, the Court may make an order for the appointment of a new trustee in substitution for a trustee who is convicted of felony or is a bankrupt."

The Act also provides that:—

Vesting orders.

> S. 26. "In any of the following cases, namely:—
> (i.) "Where the High Court appoints or has appointed a new trustee; and
> (ii.) "Where a trustee entitled to or possessed of any land, or

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Real Property, 53—55. Reference may usefully be made to the case of *Carter* v. *Williams* (L. R. 9 Eq. 678), as exemplifying the doctrine of constructive notice (though applied to another matter, viz., the burden of a restrictive covenant), showing on the one hand a state of facts in which it would arise, and on the other a state of facts in which it would not arise. See also *Patman* v. *Harland*, 17 Ch. Div. 353, as to constructive notice of the contents of a deed (*e.g.*, a lease) of the existence of which a purchaser knows; and *Bailey* v. *Barnes*, [1894] 1 Ch. 25, at pp. 31, 34, and 35.

(*s*) 45 & 46 Vict. c. 39, s. 3, see Appendix, *post*; *Bailey* v. *Barnes*, [1894] 1 Ch. 25, at p. 35.

(*t*) See the old express power and the statutory power discussed, Elph. Introd. 353; and see 1 K. & E., p. 99, note and Appendix, *post*.

(*u*) 56 & 57 Vict. c. 53; see ss. 25 and 26.

(*x*) 13 & 14 Vict. c. 60; 15 & 16 Vict. c. 55.

entitled to a contingent right therein, either solely or jointly with any other person,—

(a) is an infant, or

(b) is out of the jurisdiction of the High Court, or

(c) cannot be found; and

(iii.) "Where it is uncertain who was the survivor of two or more trustees jointly entitled to or possessed of any land; and

(iv.) "Where, as to the last trustee known to have been entitled to or possessed of any land, it is uncertain whether he is living or dead; and

(v.) "Where there is no heir or personal representative to a trustee who was entitled to or possessed of land and has died intestate as to that land, or where it is uncertain who is the heir or personal representative or devisee of a trustee who was entitled to or possessed of land and is dead; and

(vi.) "Where a trustee jointly or solely entitled to or possessed of any land, or entitled to a contingent right therein, has been required, by or on behalf of a person entitled to require a conveyance of the land or a release of the right, to convey the land or release the right, and has wilfully refused or neglected to convey the land or release the right for twenty-eight days from the date of the requirement;

"The High Court may make an order (in this Act called a vesting order) vesting the land in any such person in any such manner and for any such estate as the Court may direct, or releasing or disposing of the contingent right to such person as the Court may direct" (*y*).

By the Lunacy Act, 1890 (*z*), the Judge in Lunacy (defined in s. 108) may make vesting orders where a lunatic is solely or jointly seised or possessed of any land upon trust, or may appoint a person to convey the land.

Originating summons as to trusts.

Application might formerly be made under 22 & 23 Vict. c. 35, s. 30, to a Judge of the Chancery Division of the High Court by petition for his opinion, advice, or direction, on any question respecting the management or administration of the trust property; but formerly questions of construction could, in general, only be decided in a regular suit (*a*). Now such matters can generally be decided by means of the simple pro-

(*y*) See *Re Lees' Settlement Trusts*, [1896] 2 Ch. 508. As to vesting orders in case of lunatic trustees, see *ante*, p. 121.

(*z*) 53 Vict. c. 5, s. 135, replacing Trustee Act, 1850 (13 & 14 Vict. c. 60), s. 3.

(*a*) *Re Hooper*, 29 Beav. 656; and Dan. Ch. Pr. 2229.

cedure by originating summons (*b*), and the above provisions of 22 & 23 Vict. c. 35, have been repealed by the Trustee Act, 1893 (*c*).

Judicial Trustees Act, 1896.

Reference should be made to the Judicial Trustees Act, 1896 (*d*) authorizing the Court, on the application of a person creating or intending to create a trust, or of a beneficiary, to appoint "a judicial trustee," either jointly with another person or as a sole trustee. The judicial trustee may be remunerated out of the trust property, and the trust accounts have to be audited annually.

(*b*) See R. S. C. Order LV. r. 3. As to the jurisdiction of the County Courts, see 51 & 52 Vict. c. 43, s. 67 (5), replacing 28 & 29 Vict. c. 99, s. 1, § 5, and s. 10, and the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 46.

(*c*) 56 & 57 Vict. c. 53.

(*d*) 59 & 60 Vict. c. 35.

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CHAPTER XI.

POWERS (*a*).

We have considered the general nature of an estate—the distinction between estates legal and equitable—and the operation in relation thereto of the Statute of Uses. We proceed to consider the nature of that right which is termed a "Power."

I. Distinction between a power and an estate.

An estate in land is equivalent to the ownership of the land, either for what is practically an absolute interest (subject to that of the lord), as in the case of an estate in fee simple, or for some limited interest, as in the case of an estate for life or in tail. A Power exerciseable with respect to land is distinguishable from an estate in the land (*b*). It is an authority to dispose of some interest in the land.

"General" and "Special" Powers.

The person to whom the power is given is called the "donee" of the power, or, when he exercises it, the "appointor," and the person in whose favour it is exercised, the "appointee." A power may be either "general" or "special" (sometimes called a "limited" or "particular" power). Under a general power, the donee may appoint to any person, including himself; under a special power, an appointment can be made only for the purposes and to the persons or class of persons (called the "objects" of the power) specified by the donor of the power. A power may operate (1) at Common law; (2) by virtue of the Statute of Uses; (3) by virtue of some other statute; (4) in equity only. We proceed to give an example of a power of each kind.

(1) Common Law Power.

First, as to Common law powers:—

If A., being seised in fee, devise to B. in fee simple, B. takes the legal estate in the land. But if, instead of devising the land,

(*a*) It is impossible within the necessary limits of this chapter to do more than discuss some of the more important questions arising on Powers. See Farwell on Powers; Sugden on Powers.

(*b*) *Dickenson* v. *Teasdale*, 1 De G. J. & S., at 59. "A power is an individual personal capacity of the donee of the power to do something;" *per* Fry, L.J., *Ex parte Gilchrist*, 17 Q. B. D., at p. 531. It may in one sense be called the "property" of the person in whom it is vested, because every special capacity of a person may be said to be his property;

A. by his will directs B. to sell it, B. takes a power, that is, an authority to sell and convey the land, but he does not take an estate in it. In this case, until sale, the land descends to the heir at law. But if B. sells, he can convey the legal estate in the land to the purchaser, and, on his doing so, the estate of the heir is divested, *i.e.*, taken out of him. A conveyance made by B. in exercise of such a power is called a bargain and sale, and operates at Common law, so that, if uses are declared on the seisin of the purchaser, the *cestui que use* takes the legal estate.

Bargain and sale at Common law (*c*).

Secondly, as to powers operating under the Statute of Uses :—

(2) Powers under Statute of Uses.

If lands be conveyed to A. and his heirs to hold to the use of B. and his heirs, B., under the Statute of Uses, acquires a legal estate in fee simple. But if the land be conveyed to A. and his heirs, and A. be directed to stand seised of it to such uses as B. shall by deed or will appoint, and if B. fail to appoint, and in the meanwhile, subject to his appointment, to the use of C. and his heirs, B. has no estate at all, but only a power,—a power of appointing the use; and in the meanwhile, until he exercises the power, the estate vests in C., subject only to be divested by an exercise of B.'s power. B. may, for example, appoint the use to D. in fee simple, or to D. for his life only. In the former case, the exercise of the power totally divests C. of his estate, and vests the fee simple in D.: in the latter, it divests C. of his estate to the extent of D.'s life estate. In the former case, the result of the exercise of the power is the same as if by the instrument creating it A. had stood seised to the use of D. in fee; in the latter, it is as if he had stood seised to the use of D. for his life, with remainder to the use of C. in fee. On the appointment being made it operates as a declaration of a new use upon the seisin of A., and the new use takes effect from the time of execution of the power, as if it had been created by the original deed containing the power (*d*).

In this case, as D. takes the legal estate by virtue of the Statute of Uses, the effect of the statute is exhausted, for there cannot be a use upon a use (*e*). It follows that, if any uses are

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but it is not "property" within the meaning of that word as used in law; *ib.* A general power is an "interest" within the meaning of the Administration of Estates Act, 1833 (3 & 4 Will. IV. c. 104); see *Fleming* v. *Buchanan*, 3 De G. M. & G. 976.

(*c*) Sugd. Pow. 111; Elph. Introd. 79. The power can be exercised by the executors who prove and are for the time being alive; 21 Hen. VIII. c. 4. The Act applies to copyholds: *Peppercorn* v. *Wayman*, 5 D. G. & Sm. 230.

(*d*) 2 Dav. Prec. i. 176.

(*e*) *Ante*, p. 281.

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declared on the seisin of D. in favour of any other person, that person does not take the legal estate.

(3) Statutory Powers.

Thirdly, as to statutory powers :—

A statutory power is, as its name denotes, one conferred by Act of Parliament. A good example of a statutory power is afforded by the power vested in the tenant for life by the Settled Land Act to sell and convey the settled land (*f*). Where the tenant for life exercises his power, he can dispose of the whole interest settled, so that, if the legal fee is settled, he can convey the legal estate in fee to the purchaser ; and, if uses are declared on the seisin of the purchaser, the *cestui que use* takes the legal estate under the Statute of Uses.

(4) Equitable Powers.

Fourthly, as to equitable powers :—

There are two classes of equitable powers. A power of the first kind merely enables the donee to dispose of an equitable interest. For example, if the legal fee is vested in trustees in trust for A. for life, with remainder in trust for such persons as A. shall appoint, and in default of, and until, appointment, in trust for B. in fee simple, both A. and B. take equitable estates, but the estate of B. is liable to be divested wholly or partially by an exercise of the power. If, for instance, A. appoints to C. in fee simple or for life, the appointment operates as a declaration of trust in favour of C., exactly in the same manner as if it had been inserted in the settlement. In the former case, the exercise of the power divests B.'s estate wholly, in the latter case partially, so as to let in C.'s life estate. The result of the exercise of the power in the first case is the same as if by the settlement itself the trusts had been for A. for life, with remainder for C. in fee, and in the second case, as if they had been for A. for life, with remainder for C. for life, with remainder for B. in fee.

Another kind of equitable power is where the donee, being legal owner of an estate, could dispose of it if he were not prevented from doing so by some rule of equity ; and the effect of the power is merely to remove, either wholly or partially, the restraint imposed by equity. An example is afforded by the express power of sale formerly inserted in a mortgage. The mortgagee, being the legal owner of the land, could have sold, had it not been for the rule of equity that prevented him from

(*f*) See this power discussed at length, *ante*, p. 52.

doing so. The effect of the power is merely to negative the rule, and to allow him to sell, in certain events.

Concurrent power and estate.

It is possible for the fee simple in land, and also a power of appointment over it, to be vested in the same person; for example, the land may be limited to such uses as A. shall appoint, and in default of appointment to A. himself in fee simple. It will not at first sight, perhaps, appear for what reason the estate and the power are thus given to the same person, or how the two can co-exist, yet in truth they may, "the fee vesting until execution of the power, and the execution of the power being the limitation of a use under and by the effect of the instrument, by which the power was reserved" (*g*). Such limitations were of some practical use (*h*); for, in cases where a purchaser was married on or before the 1st January, 1834 (*i*), if the purchased property had been so limited, the widow's right to dower might be defeated.

Uses to bar dower.

The form (*k*) commonly used for effecting this consisted of two distinct parts, each of which answered a separate object. First, a general power of appointment over the fee simple was given to the purchaser by limiting the land to such uses as he should appoint; thus enabling him to dispose of the fee simple without his wife's concurrence, by an exercise of his power: and secondly, the land was, in default of appointment, limited to the use of the purchaser for his life, with remainder, in case of the determination of the life estate during the lifetime of the purchaser, to a trustee and his heirs during the life of and in trust for the purchaser, with an ultimate limitation to the use of the purchaser in fee simple. Under the first part of the form the purchaser took no estate but only a power; by the second part of the form a vested estate of freehold, namely, in the trustee, was interposed between the life estate and the remainder in fee of the purchaser (*l*), so that the purchaser had not at any time during his life an estate of inheritance *in possession*, out of which estate only a wife married on or before the 1st January, 1834, was dowable.

(*g*) *Per* Lord Eldon, *Maundrell* v. *Maundrell*, 10 Ves. 255; Sugd. Pow. 93.

(*h*) As to the effect of an appointment under the power defeating judgments against the owner in fee, see Elph. & Cl. Searches, 9, 20.

(*i*) The Dower Act, 1833 (3 & 4 Will. IV. c. 105), s. 14. See *ante*, p. 138.

(*k*) See Elph. Introd. 98; Wms. R. P. 365.

(*l*) 2 Dav. Prec. i. 185; and see form Stud. Prec. 144.

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Division of Powers.

Powers are either—(1) Collateral, or (2) Relating to the Land (*m*).

1. Collateral.

A power "collateral" is a bare power given to a person, who has no estate or interest in the land.

It may be "simply collateral," *i.e.*, where the donee cannot exercise it for his own benefit, *e.g.*, powers given in strict settlements before 1882 to trustees who took no estate in the settled lands, to do acts connected with the administration of the property, as during the minority of the tenant in tail to manage the property, to grant leases, &c., or at the request of the tenant for life, or during the minority of the tenant in tail, at their own discretion, to sell or exchange, &c. (*n*)

Or it may be "collateral and in gross," *i.e.*, where the donee can exercise it for his own benefit, *e.g.*, when land is limited to such uses as A. shall appoint.

2. Relating to the land.

A power "relating to the land" is a power given to some person having an estate or interest in the land over which it is to be exercised, *e.g.*, a power given to a tenant for life, in a strict settlement to jointure a wife, or in a settlement before 1882 to grant leases.

Powers relating to the land are either "appendant" or "in gross" (*o*).

a. Appendant.

They are "appendant" when the estates created by their exercise over-reach and affect the estate and interest of the donee of the power, *e.g.*, an express power of leasing given to the tenant for life (*p*).

b. In gross.

They are "in gross" when the estates so created do not affect the estate or interest of the donee, but notwithstanding are annexed in privity to it; *e.g.*, a power of jointuring (*q*) given to a tenant for life is in gross, for a jointure limited by virtue of the power commences from the death of the husband.

Execution of powers after

If the donee of a power appendant alienates or incumbers his estate, any exercise of the power (which, it will be remembered,

(*m*) See Farw. Pow. 8; Sugd. Pow. 46; Tudor, L. C. R. P., notes to *Edwards* v. *Slater*, 377. The second class of powers are called by Mr. Butler (note to Co. Litt. 342 b) "powers relating to the estate of the donee of the power in the land."

(*n*) See forms in Dav. Conc. Prec. 481, *et seq.*, 546, note; 2 K. & E. 580, *et seq.*

(*o*) There is some confusion in the application of the word "appurtenant" to powers. It is used to denote sometimes only a power appendant, and sometimes any power relating to the land.

(*p*) Farw. Pow., p. 9.

(*q*) See Stud. Prec. 92; 2 K. & E. 568, for forms of such powers.

takes effect out of his interest), would operate as a derogation from his previous grant, and is therefore invalid as against the alienee or incumbrancer; but he may exercise it with the consent of the alienee or incumbrancer (*r*).

Alienation by donee.

A power, whether appendant or in gross, cannot be exercised after the alienation of the estate of the donee if an intention that it shall not thereafter be exercised is clearly expressed in the instrument creating the power (*s*).

"Power coupled with an interest."

If the donee of the power has an interest in the land, he is said to have "a power coupled with an interest." In such cases an assurance made by the donee will take effect, either out of his interest or under the power, as will best carry out his intention, and that whether he purports to convey as owner, or as donee of the power, or as both (*t*). For example, in *Cox* v. *Chamberlain* (*u*), lands stood limited to such uses as A. should appoint, and in default to him in fee. A. by lease and release, a conveyance sufficient to pass the fee in the absence of the power, "in pursuance of all powers vested in him" appointed to P. and his heirs to certain uses. If the fee passed by the lease and release, the *cestui que use* took the legal estate by force of the Statute of Uses, and the title was good; if the fee passed by the appointment, the *cestui que use* took an equitable estate only, and the title was bad. The Court held that, as the conveyance could operate either way, it must be held to have operated under the lease and release so as to carry out the intention.

Another example is where a tenant for life with power of leasing makes a lease without reference to his power. The lease, if made by him as owner, will expire with his life; and therefore, if the lease is one which could have been made under the power, it will be considered as having been so made (*x*).

Delegation of powers.

Where a power involves the exercise of personal discretion, *e.g.*, a power of leasing, the maxim applies, "*delegatus non potest delegare;*" the donee of the power only can exercise it, and not his attorney. But this maxim does not apply where the act is purely ministerial—*e.g.*, a deed may be executed by attorney (*y*)

(*r*) *Alexander* v. *Miles*, L. R. 6 Ch. 124.

(*s*) *Haswell* v. *Haswell*, 2 De G. F. & J. 456.

(*t*) See, for an exception to the rule, Farw. Pow. 267.

(*u*) 4 Ves. 631.

(*x*) *Campbell* v. *Leach*, Amb. 740.

(*y*) As to the execution now of deeds and other instruments under power of attorney, see *post*, p. 316.

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after the donee has approved the draft; nor does it apply to the case of a general power—*e.g.*, if a man has power of sale as absolute owner, he may sell by attorney. So where an estate stands limited to such uses as A. shall appoint, an appointment by A. to such uses as B. shall appoint will be valid and effectual to pass the legal estate under an appointment by B. of the use (*z*).

Bankruptcy of donee.

Under the Bankruptcy Act, 1883 (*a*), the property of the bankrupt divisible among his creditors, vests in the trustee in bankruptcy, and comprises "the capacity to exercise and to take proceedings for exercising all such powers (*b*) in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or before his discharge, except the right of nomination to a vacant ecclesiastical benefice;" and the trustee may exercise such powers.

Execution.

A power may be expressed to be exerciseable only by a specified instrument as a deed or a will, or with certain formalities; for instance, it may be required that the instrument of execution shall be attested by a given number of witnesses. In all such cases it is requisite that the instrument should be of the prescribed nature, and formerly it was necessary that it should be executed with the prescribed formalities. Thus, a power to be executed by deed cannot be executed by will, or *vice versâ*, and a power requiring the presence and attestation of three witnesses could not formerly be exercised by an instrument executed in the presence of two only.

By deed.

As regards deeds executed after the 13th August, 1859, it is provided by the Law of Property Amendment Act, 1859, commonly called Lord St. Leonards' Act (*c*), that—

Mode of execution of powers.

> "A deed hereafter executed in the presence of and attested by two or more witnesses in the manner in which deeds are ordinarily executed and attested, shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by deed or by any instrument in writing not testamentary,

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(*z*) As to delegation of powers, see Farw. Pow. 440, *et seq.*

(*a*) 46 & 47 Vict. c. 52, ss. 44 (ii.), 56 (4).

(*b*) This does not extend to a general power of appointment vested in a married woman; *Ex parte Gilchrist*, 17 Q. B. D. 521.

(*c*) 22 & 23 Vict. c. 35, s. 12.

notwithstanding it shall have been expressly required that a deed or instrument in writing made in exercise of such power should be executed or attested with some additional or other form of execution, or attestation, or solemnity: Provided always, that this provision shall not operate to defeat any direction in the instrument creating the power that the consent of any particular person shall be necessary to a valid execution, or that any act shall be performed in order to give validity to any appointment having no relation to the mode of executing and attesting the instrument, and nothing herein contained shall prevent the donee of a power from executing it conformably to the power by writing or otherwise than by an instrument executed and attested as an ordinary deed, and to any such execution of a power this provision shall not extend."

By will.

As to powers exerciseable by will, the Wills Act, 1837 (*d*), provides that, whatever be the requirements of the instrument creating the power, if the will exercising the power be executed in conformity with the provisions of the Act, such execution is a valid exercise of the power; and that no appointment made by will in exercise of any power shall be valid unless executed in the manner required by the Act.

Will referring to power.

Where a general power of appointment is made exerciseable by will, it will be exercised by a general devise; but if the power requires it to be exercised only by a will "referring to" the power, the will does not operate as an execution of the power unless it refers to it or deals with the property subject to the power (*e*).

Instrument to be "signed, sealed, and delivered."

Where a power of appointment was given to a woman "by any *instrument* in writing to be by her signed, *sealed*, and delivered in the presence of and attested by two or more credible witnesses," and she devised by her will, not sealed, "all her real and personal estate over which she had a disposing power," it was held not to be a good execution of the power, notwithstanding the Wills Act, 1837 (*f*).

Defective execution, when aided in equity.

There are certain cases in which the execution of a power which is defective at law is sustained in equity, on behalf of persons standing in certain favoured positions, as purchasers, lessees, mortgagees, creditors, the wife and children of the donee of the power, and charities, provided that the defect is merely

(*d*) 7 Will. IV. & 1 Vict. c. 26, s. 10. See *post*, Ch. XV.

(*e*) 7 Will. IV. & 1 Vict. c. 26, s. 27; *post*, p. 409; *Re Phillips*, 41 Ch. Div. 417; *Re Tarrant*, 58 L. J. Ch. 780; *Phillips* v. *Cayley*, 43 Ch. Div. 222; *Re Davies*, [1892] 3 Ch. 63.

(*f*) *Taylor* v. *Meads*, 4 De G. J. & S. 597; see *post*, p. 395, *et seq.*

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formal. Thus, suppose a person, having a power of appointment by an instrument to be executed in the presence of two witnesses, makes an appointment in favour of any one of these favoured persons by a deed executed in the presence of one witness only; or a person, having a power of appointment by deed or will, writes a memorandum expressing his wish with regard to it and dies without having legally executed it; in both these cases equity supports the execution, provided it sufficiently appears that there was an intention on the part of the donee to give the property which he had power to dispose of (*g*). Similarly a mere agreement, if for valuable consideration, to exercise a power is in equity treated as a defective execution, and the Court will supply the defect (*h*).

Defective execution in case of Leases.

Under the Leases Act, 1849 (*i*), relief against defects in leases made under powers of leasing, may be granted in certain cases.

Powers of revocation.

Where a settlor desires to reserve to himself the power of altering or of revoking the settlement, it is necessary to insert in the deed a power to revoke it, wholly or partially (*k*). Such a power is called a "power of revocation," and may operate either under the Statute of Uses, or in equity. As regards voluntary settlements, it is said by Mr. Davidson (*l*) :—

> "They are mostly executed with the view to their having a *quasi*-testamentary operation, and being revocable if the settlor should desire to make other dispositions; and the draftsman receiving instructions for an instrument of this kind should therefore provide for the revocation of the settlement, unless he is satisfied that it is the settlor's own wish to make it irrevocable. In many cases voluntary settlements, in form irrevocable, have been treated as revocable, or set aside, on the ground that a power of revocation ought to have been inserted."

The ground for setting aside a voluntary settlement is generally that it was made under undue influence (*m*). The absence of a power of revocation and the fact that the attention of the settlor was not called to that absence are, however, merely elements in

(*g*) Sugd. Pow., Ch. XI.; Farw. Pow., Ch. VII., p. 330, 335; and see *Kennard* v. *Kennard*, L. R. 8 Ch. App. 227; *Re Kirwan's Trusts*, 25 Ch. Div. 373.

(*h*) *In re Dyke's Estate*, L. R. 7 Eq. 337.

(*i*) 12 & 13 Vict. c. 26. The operation of this Act was suspended till the 1st June, 1850, by 12 & 13 Vict. c. 110, and it was amended by the Leases Act, 1850 (13 & 14 Vict. c. 17). See *Hallett* to *Martin*, 24 Ch. Div. 624; *Gas Light and Coke Co.* v. *Towse*, 35 Ch. Div. 519, 539; *Sutherland* v. *Sutherland*, [1893] 3 Ch. 169, 194; Farw. Pow. 351, *et seq.*

(*k*) *Ante*, p. 110, note (*y*).

(*l*) 3 Dav. Prec., Part I., p. 695.

(*m*) *Ante*, p. 110, note (*z*).

considering its validity: it may be valid notwithstanding that it contains no power of revocation (*n*).

Revocation of Uses;

An estate once created by an assurance operating at Common law can only be defeated by a condition (*o*), so that a power purporting to enable a person to revoke the estate is void. On the other hand, where a conveyance contains a declaration of uses so that the *cestuis que use* take legal estates by virtue of the Statute of Uses, it is possible to insert a power to revoke the uses; and on the power being exercised, the uses cease, and with them the corresponding estates. Provisoes containing power of revocation, says Lord Coke (*p*), crept into voluntary conveyances, which pass by raising of uses, being executed by the Statute of Uses. Such proviso being coupled with a use, was allowed to be good, and not repugnant to the former estates (*q*). In case of such a revocation, says Blackstone (*r*)—

> "The old uses were held instantly to cease, and the new ones" (if the power extended to the appointment of new ones) "to become executed in their stead. And this was permitted partly to indulge the convenience, and partly the caprice of mankind; who (as Lord Bacon observes) have always affected to have the disposition of their property revocable in their own time, and irrevocable ever afterwards."

It should, however, be added, that estates created by the execution of a power cannot be revoked, unless a power of revocation be reserved by the instrument executing the power, although the instrument creating the power expressly authorizes revocation (*s*).

and new appointment.

Where, in addition to the power of revoking the old uses, power is given to declare new uses, the power is called one of "revocation and new appointment." It has commonly been employed for the purpose of carrying out some of the subsidiary provisions of a settlement, *e.g.*, where express powers of sale and exchange are given; this was worked out by giving a power to revoke the old, and declare new uses of the lands sold or given in exchange, and to settle the lands purchased with the money arising from such sale or taken in exchange to the subsisting uses of the settlement (*t*). Other powers frequently inserted in

(*n*) *Hall* v. *Hall*, L. R. 8 Ch. 430; *Henry* v. *Armstrong*, 18 Ch. Div. 668.
(*o*) 2 Bl. 327.
(*p*) Co. Litt. 237 a.
(*q*) *Ib.*
(*r*) Vol. ii. 335.
(*s*) Farw. Pow. 271; *Booker* v. *Booker*, 34 W. R. 346.
(*t*) Elph. Introd. 392.

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strict settlements, such as the power to jointure (*u*), and express powers of leasing (*x*), really operate in the same manner. It is not, however, the practice expressly to authorize the donee of those powers to revoke the old uses, for the power to declare new uses gives him implied authority to do so.

Powers of sale—Timber. Minerals.

Under the ordinary power of sale and exchange, trustees cannot sell the lands without the timber, nor allow the tenant for life unimpeachable for waste to sell the timber, nor can they sell land reserving the minerals, for to do so would be to prejudice the reversioner (*y*). Sir J. Romilly, M.R., said (*z*):—

"The principle is this:—The power must be so exercised as not to give the tenant for life more out of the property subject to the power than he would have had if the power had not been exercised. The mines are a part of the *corpus*, which the tenant for life, being unimpeachable for waste, is entitled to win and sell, and thus obtain the profits of; but the surface land being sold, the purchase-money is to be reinvested in land, and if an estate with valuable minerals under it were found to be the most eligible mode of investment, the tenant for life would get the minerals from under the two estates. It is clear that this could not be prevented, for the Court could not refuse to allow the purchase-money to be invested in the purchase of an estate with minerals under it, if such a purchase were valuable and beneficial for the persons entitled; neither could it restrict the purchase to lands of which the mere value was agricultural, or if not, prevent the tenant for life from working the mines.

"It is obvious that the Court could not exact from the tenant for life any promise not to purchase any land of that description, nor, if exacted, enforce it. It is the same in this case as in that of timber; no promise or undertaking as to reinvestment would be of any avail, nor could it be enforced by this Court.

"I think the principle clear, that in selling a piece of this land, you must sell the whole of the minerals under it as well as the surface of the land itself."

Confirmation of Sales Act; Trustee Act, 1893

The Confirmation of Sales Act (*a*) cured the invalidity of past sales, under such a power, of the land separately from the minerals, or of the minerals separately from the land, excepting sales declared invalid, or sales as to the validity of which litigation was pending (*b*); and for the future empowered trustees so to sell with the sanction of the Court of Chancery, to be obtained in a summary way, and such sanction, once obtained, rendered

(*u*) Elph. Introd. 880.
(*x*) *Ib.* 888.
(*y*) *Chalmeley* v. *Paroons*, 8 Bing. 207.
(*z*) *Buckley* v. *Howell*, 29 Beav. 552. See, as to this case, Dart, V. & P. 1296, 1297.
(*a*) 25 & 26 Vict. c. 108. See Dart, V. & P. 77, 1296; Seton, 1470, 1471; Pemberton on Judgments, 846.
(*b*) 25 & 26 Vict. c. 108, s. 1.

further application unnecessary in respect of any part or parts of the land comprised in the order (*c*). This statute was repealed and replaced by the Trustee Act, 1893 (*d*).

On sales of settled estates authorized by the Court under the Settled Estates Act, 1877 (*e*), any earth, coal, stone, or mineral may be excepted, and (*f*) any timber (not being ornamental timber) growing on any settled estates, may be sold, if the Court deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement.

And the Settled Land Act, 1882 (*g*), enacts that on a sale, exchange, or partition under the Act, any reservation or exception with respect to mines and minerals may be made (*h*).

Proceeds of timber paid by mistake to tenant for life.

Reference should here also be made to the provisions of the Law of Property Amendment Act, 1859 (*i*), as to cases of the mistaken payment to the tenant for life in respect of the timber, &c., viz., that—

> S. 13. "Where under a power of sale a *bonâ fide* sale shall be made of an estate with the timber thereon, or any other articles attached thereto, and the tenant for life or any other party to the transaction shall by mistake be allowed to receive for his own benefit a portion of the purchase-money as the value of the timber or other articles, it shall be lawful for the Court of Chancery, upon any bill or claim or application in a summary way, as the case may require or permit, to declare that upon payment by the purchaser, or the claimant under him, of the full value of the timber and articles at the time of sale, with such interest thereon as the Court shall direct, and the settlement of the said principal moneys and interest, under the direction of the Court, upon such parties as in the opinion of the Court shall be entitled thereto, the said sale ought to be established; and upon such payment and settlement being made accordingly, the Court may declare that the said sale is valid, and thereupon the legal estate shall vest and go in like manner as if the power had been duly executed, and the costs of the said application as between solicitor and client shall be paid by the purchaser or the claimant under him."

Extinguishment or

The distinction between powers "simply collateral" (*ante*,

(*c*) 25 & 26 Vict. c. 108, s. 2. The section extends to a mortgagee with a power of sale, *Re Hirst's Mortgage*, 45 Ch. Div. 263; see also *Re Wadsworth's Trusts*, W. N. 1890, p. 163.

(*d*) 56 & 57 Vict. c. 53, s. 44, as amended by 57 Vict. c. 10, s. 3.

(*e*) 40 & 41 Vict. c. 18, s. 19.

(*f*) S. 16.

(*g*) 45 & 46 Vict. c. 38; see *ante*, pp. 51, *et seq.*

(*h*) 45 & 46 Vict. c. 38, s. 4 (6), and s. 17; and see the Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 5.

(*i*) 22 & 23 Vict. c. 35. This was enacted in consequence of the decision in *Cockerell* v. *Cholmeley*, 1 Russ. & M. 418; and see *Cholmeley* v. *Paxton*, 3 Bing. 207.

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suspension and release of powers.

p. 302) and other powers is important with respect to their extinguishment or suspension and release. For before 1882, a power simply collateral could not be extinguished or suspended by any act of the donee, or of any other persons, with respect to the land; nor could it be released where it was to be exercised for the benefit of another (*k*). On the other hand, powers collateral and in gross, and powers relating to the land, whether appendant or in gross, might be suspended or destroyed by the donee (*l*). In *West* v. *Berney* (*m*), Leach, V.-C., said:—

West v. *Berney.*

"Upon the authorities and principle my opinion is, that a power simply collateral, that is, a power to a stranger, who has no interest in the land, cannot be extinguished or suspended by any act of his own or others with respect to the land. It is clear, too, that it cannot be released, where it is to be exercised for the benefit of another.

"It must be equally clear that it may be released, where it is for his own benefit, as a power to charge a sum of money for himself. In such case his joining in a conveyance of the land clear of the charge, would be a release. I think that every power reserved by the grantor, whether he has retained an interest in the estate as tenant for life or otherwise, is an interest in him, which may be released or extinguished. It differs altogether from a naked authority given to a mere stranger. It is so much reserved by him out of the estate. I think that every power reserved to a grantee for life, though not appendant to his own estate as a leasing power, but to take effect after the determination of his own estate, and therefore, in gross, may be extinguished. In respect of his freehold interest he can act upon the estate, and his dealing with the estate so as to create interests inconsistent with the exercise of his power, must extinguish his power. The general principle is, that it is not permitted to a man to defeat his own grant. Such a power in gross in tenant for life would not be defeated by a conveyance of his life estate, as a power appendant or leasing power would be defeated; because the conveyance of his life estate is not inconsistent with the exercise of his power" (*n*).

A power given to the owner of an estate for life, or other particular estate, whether appendant or in gross, is extinguished by his acquiring the fee simple (*o*), or when the purposes for which it was created no longer exist (*p*).

Release under

Now by the Conveyancing and Law of Property Act, 1881 (*q*),

(*k*) Farw. Pow., p. 11. A simply collateral power given to a trustee, as such, is incapable of being exercised by him after he has ceased to be a trustee.

(*l*) Farw. Pow., p. 15.

(*m*) 1 Russ. & M. 431.

(*n*) See also *Smith* v. *Death*, 5 Madd. 371.

(*o*) *Cross* v. *Hudson*, 3 Bro. C. C. 30.

(*p*) *Wheate* v. *Hall*, 17 Ves. 80. See on this point a series of articles "On the Duration of Powers and Trusts for Sale," 32 Sol. J. 684, *et seq.*

(*q*) 44 & 45 Vict. c. 41, s. 52. But it has been held that a power coupled with a duty cannot be released; *Re Eyre*,

a person to whom any power, whether coupled with an interest or not, is given, may by deed release, or contract not to exercise the power (*r*).

Conveyancing Act, 1881.

And by the Conveyancing Act, 1882 (*s*), it is further provided that a person to whom any power, whether coupled with an interest or not, is given, may by deed disclaim the power, and "on such disclaimer the power may be exercised by the other or others, or the survivors or survivor of the others, of the persons to whom the power is given, unless the contrary is expressed in the instrument creating the power."

Disclaimer under Conveyancing Act, 1882.

A power of appointment among a class which authorizes the donee to select one or more members of the class to the exclusion of the others, is called an exclusive power; one which does not allow the entire exclusion of any one member is called a non-exclusive power.

Powers:—
1. Exclusive.
2. Non-exclusive.

In marriage settlements of real estate, an exclusive power of appointment among the children of the marriage may take the form following;—

"To the use of the child or of all or such one or more exclusively of the others or other of the children of the said intended marriage for such estates or estate interests or interest and if more than one in such shares and with and subject to such charges powers provisoes conditions restrictions limitations and remainders over for the benefit of the said children or some or one of them and in such manner as the said (parents) shall by any deed or deeds or writing or writings sealed and delivered with or without power of revocation and new appointment appoint" (*t*).

As to whether a power is exclusive or non-exclusive, Mr. Farwell says (*u*):—

"Each case must depend on the intention expressed in the particular instrument creating the power: no general rule can be laid down, except perhaps that the words 'all and every' are mandatory and make it necessary that each object should have a share, and that 'such' authorizes exclusion, unless a contrary intention appear."

W. N. 1883, p. 153; 49 L. T. 259; *Saul* v. *Pattinson*, 34 W. R. 561. The ordinary power of appointment among children or issue given to a tenant for life may be released; *Re Radcliffe*, [1892] 1 Ch. 227; *Re Somes*, [1896] 1 Ch. 250.

(*r*) This section applies to powers created by instruments coming into operation either before or after the commencement of the Act.

(*s*) 45 & 46 Vict. c. 39, s. 6. This section applied to powers created by instruments coming into operation either before or after the commencement of the Act.

(*t*) 3 Dav. Prec. ii. 1236; see Dav. Conc. Prec. 480, for a short form.

(*u*) Farw. Pow., p. 362; *Re Veale's Trusts*, 4 Ch. Div. 61, at p. 64.

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Under the law prior to the statute next mentioned, it was held in equity, that the donee of a non-exclusive power must appoint a substantial share to each object of the power; though at law, if anything, however small, were appointed, the requirement of the power was satisfied (*x*).

11 Geo. IV. & 1 Will. IV. c. 46.

The Illusory Appointments Act, 1830 (*y*), provided that—

> "No appointment which from and after the passing of this Act (*i.e.*, 16th July, 1830) shall be made in exercise of any power or authority to appoint any property, real or personal, amongst several objects, shall be invalid or impeached in equity on the ground that an unsubstantial, illusory, or nominal share only shall be thereby appointed to or left unappointed to devolve upon any one or more of the objects of such power; but every such appointment shall be valid and effectual in equity as well as at law, notwithstanding that any one or more of the objects shall not thereunder, or in default of such appointment, take more than an unsubstantial, illusory, or nominal share of the property subjected to such power."

But even after this Act an appointment was bad if it omitted any object of the power, though the appointment of a shilling, or even a farthing, would satisfy the Act in this respect (*z*).

37 & 38 Vict. c. 37.

By the Powers of Appointment Act, 1874 (*a*), therefore, it was enacted that—

Appointments to be valid notwithstanding one or more objects excluded.

> S. 1. "No appointment, which, from and after the passing of this Act (*i.e.*, the 30th July, 1874) shall be made in exercise of any power to appoint any property real or personal amongst several objects, shall be invalid at law or in equity on the ground that any object of such power has been altogether excluded, but every such appointment shall be valid and effectual notwithstanding that any one or more of the objects shall not thereby, or in default of appointment, take a share or shares of the property subject to such power.
>
> S. 2. "Provided always, that nothing in this Act contained shall prejudice or affect any provision in any deed, will, or other instrument creating any power, which shall declare the amount or the share or shares from which no object of the power shall be excluded, or some one or more object or objects of the power shall not be excluded."

Excessive execution.

Where the interests attempted to be created in exercise of a power are either contrary to a rule of law or to the scope of the power, the execution is called "excessive."

Where it is attempted to create an interest offending against a

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(*x*) Farw. Pow. 371.

(*y*) 11 Geo. IV. & 1 Will. IV. c. 46, s. 1.

(*z*) *Gainsford* v. *Dunn*, L. R. 17 Eq. 406.

(*a*) 37 & 38 Vict. c. 37.

rule of law, that interest is void. Thus, a power cannot be exercised so as to create a perpetuity, *i.e.*, to tie up an estate longer than the period allowed by law—that is to say, a life or lives in being and twenty-one years after, with an additional period for gestation, if it actually exists (*b*).

Estates take effect under instrument creating the power.

The limitations created under the exercise of powers are treated as taking effect under the instrument creating the power itself.

Perpetuities:—
1. General powers.

When the power is a "general power," as in the case of a power to A. to appoint generally without restriction in his choice of objects, in considering the application of the rule against perpetuities, he is regarded as absolute owner of the property; in other words, the time from which the period allowed by the rule is to be reckoned is the time when the instrument executing the power takes effect; *i.e.*, the time of execution, if it is a deed, the death of the testator, if it is a will (*c*). But when the power is a "special" or "limited" or "particular" power, that is, where the objects of it are specified persons or a specified class of persons, the donee cannot so exercise the power as to create any estate which might not have been limited by the instrument conferring the power (*d*), although, apart from the rule against perpetuities, the creation of such an estate would be a valid exercise of the power.

2. Special powers.

To quote Mr. Lewis (*e*):—

"A particular power may embrace objects of any degree of remoteness; *i.e.*, such a power will not be void, because it attempts to authorize an appointment to persons, not necessarily born, or the creation of interests, not necessarily vested, within the fixed boundaries of perpetuity. The power itself not giving any right, or creating any definite interest, no danger ensues from the range of choice or selection extending to objects, whom the law would not allow to participate in an express gift. The possible exercise of the power, in favour of such objects, only answers to the chances of abuse, which attend the power of dominion possessed by a person absolutely entitled, but which have never been supposed to justify the total deprivation of that power, or to disallow its exercise within temperate limits. Did the rules of law require an exercise of the power in favour of every person answering to the description of the objects embraced by it, or did the conferring a power of appointment

(*b*) See *ante*, pp. 102, 286.

(*c*) Notes to *Cadell* v. *Palmer*, Tudor, L. C. R. P. 485. It has been decided, after some difference of judicial opinion, that this rule applies to the exercise of a general power by a married woman: *Rous* v. *Jackson*, 29 Ch. Div. 521.

(*d*) Farw. Pow. 286; and 3 Dav. Prec. i. 154, note.

(*e*) Lewis on Perpetuities, pp. 487, *et seq.*

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among a class of persons, operate as an implied gift to all the members of that class, in default of the exercise of the power, arguments would exist against extending a power to persons who could not legally participate in any direct gift, contemporaneous with, or made instead of, the power. The security against the violation of the laws of remoteness consists in the very discretion and latitude of choice with which the donee of the power is invested by it, and in the failure and nullification of his dispositions, consequent upon an abuse of that discretion.

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"But, although there is no necessity to confine the objects of a power to those who might be legally included in an express gift of the same date, it is a long-established rule that no estate or interest can be limited under a particular power, which would have been too remote, if limited in the deed or will creating the power. The office of discrimination belongs to the donee of the power; and if properly discharged, by the appointment of interests which would have been valid in the original instrument, the circumstance that the power embraced other objects too remote, will not affect the appointment; but if the appointment extend to persons, or create interests beyond the boundaries of perpetuity, as tested by their insertion in the instrument creating the power, the appointment fails.

"Thus, if A. have a power of appointment among the issue of B., and he appoint to all the children of a son of B., who was unborn at the date of the instrument creating the power, the appointment is bad; because the grandchildren of B., comprised in it, will not necessarily be born, within the period of a life in being and twenty-one years, computed from the date of the original settlement.

"But, if the appointment be to such of the children of B.'s son as shall be born during the life of the donee of the power, or within twenty-one years from his decease, or before the expiration of twenty-one years from the decease of any other person, or the survivor of any number of persons, living at the time of the creation of the power, it will be entirely free from objection, because such a limitation would have been valid if contained in the original settlement or will. And so, if the appointment be to the children of B. (he having none when the power was created), on their attainment of the age of twenty-five years, or other age above majority, it will be void, as too remote, inasmuch as, under such a limitation, if inserted in the deed creating the power, the vesting of the interests of the children might have been suspended for a longer period than a particular life or number of lives in being, and twenty-one years. But if, by the appointment, the attainment of the required ages by the children of B. be confined to take place within the legal limits of remoteness, computed from the taking effect of the original will or settlement, it will be unobjectionable; as such restriction on the happening of the specified event, in itself too remote, would have sufficed to restrain its tendency to a perpetuity, if inserted in the instrument creating the power. It will be observed that, wherever the appointment is to the grandchildren or remoter issue of the person, in favour of whose issue the power was created, and the birth of the issue to take under the appointment is restricted to the period of twenty-one years after the expiration of any life or lives, the vesting of the interests of the issue must not be postponed beyond their birth, as the whole period of the perpetuity-

boundary is absorbed by the contingency which surrounds the objects of the gift. If, therefore, it be desired to suspend the vesting of the shares of the issue till their majority, care must be taken to provide that the issue, who are included under the appointment, shall be born during the life of the donee of the power, or during the lives of any persons living at the time of the creation of the power, and the life of the survivor."

A good illustration of the above remarks was furnished in *Re Brown and Sibly's Contract* (*f*) :—

By a marriage settlement, freehold property was conveyed to trustees to the use of the settlor, William Metford, for life, and after his death, "to the use of all or any one or more exclusively of the children, grandchildren, or other issue of William Metford" (to be born before the appointment should be made), as he should by deed or will appoint, and in default to the uses therein declared. By his will, William Metford appointed the property to the use of his son, William E. Metford, in fee, but in case William E. Metford should have no child who should attain the age of twenty-one years, the testator requested him to grant, appoint, or devise to the use of his (the testator's) grandson, W. M. Badcocke, in fee. The question arose on the sale of a portion of the property whether William E. Metford had an absolute fee simple in the estate, and could make a good title without the concurrence of W. M. Badcocke.

Malins, V.-C., said:—

"The law is settled, that where a person takes property by virtue of the execution of a special or limited power of appointment, he takes directly under the instrument creating the power. Consequently, when William Metford made his will, it was the same as if the words he there used had formed part of the settlement, and as if the property had been conveyed by that settlement to trustees to the use of himself for life, with remainder to the use of his (unborn) son in fee, with a direction that in case his son should have no child who should attain twenty-one, then, that the estate should, after the son's death, go over to the settlor's grandson in fee. That is an attempt to make the property inalienable for a period which might extend to twenty-one years after the determination of the life of a person not in being at the date of the settlement. The law does not allow a man to tie up property for longer than a life or lives in being and twenty-one years; and this is clearly an attempt to do what is contrary to the law.

"My opinion, therefore, is, that the appointment by the testator to his son in fee is good, and the attempt to give the estate over is void. It is precisely the same as if a man were to give property to his son for life, and after his decease to his son's children, as tenants in common in fee, with a proviso that if any of the children should die under twenty-five the property should go over. In that case, the proviso carrying over the shares would be void. The gift to the son in fee is therefore good, and the executory devise over is void."

(*f*) 3 Ch. Div. 156. It was on a different point that the decision of the V.-C. was dissented from by Jessel, M.R., in *In re Bellis's Trusts*, 5 Ch. Div. 504.

Excessive execution.

The principle on which executions of powers which are excessive, having regard to the scope of the powers, are dealt with was laid down by Sir Thomas Clarke, M.R. (*g*), as follows:—

"Where there is complete execution of a power, and something *ex abundanti* added, which is improper, there the execution shall be good, and only the excess void; but where there is not a complete execution of a power, where the boundaries between the excess and execution are not distinguishable, it will be bad" (*h*).

Valid appointment to persons not objects of the power.

A valid appointment may, however, be made to persons not objects of the power, with the concurrence of those who are objects; thus, upon the marriage of a child, a parent with power to appoint among his children, may, with the consent of the child, appoint to the intended husband and the issue of the marriage, and the appointment will be valid in equity. Such an arrangement is regarded first as an appointment, and then as a settlement by the object of the power (*i*).

To separate use without power of anticipation.

A question has arisen whether, where there is a power of appointment among children and in exercise of such power an appointment is made to daughters to their separate use without power of anticipation, the appointment can be upheld or is void for remoteness. There are decisions that the appointment, so far as it is to their separate use, is good, but that, so far as it restrains anticipation, it is excessive and must be rejected (*k*). But these decisions were disapproved by Sir G. Jessel, M.R., in a case in which, sitting as a Judge of first instance, he felt himself bound to follow them (*l*).

Power of attorney.

A power of attorney is an authority from one person to do an act in the turn, stead, or place of another: as, in the case of a feoffment, a letter of attorney to deliver seisin to the feoffee, which must be by deed, and must be executed in the lifetime of the donor (*m*). Hence it came to be necessary in making out title to property that, where any deed had been executed by attorney, the power should be produced and evidence given of

Requirements for validity of exercise.

(*g*) In *Alexander* v. *Alexander*, 2 Ves. Sen. 640; Tudor, L. C. R. P. 395.

(*h*) See as to numerous questions arising under this rule, Farw. Pow. 298, *et seq.*

(*i*) See Farw. Pow. 416; *Re Turner's Settled Estates*, 28 Ch. Div. 205.

(*k*) Farw. Pow. 295, and cases there cited.

(*l*) See *per* Jessel, M.R., in *In re Ridley*, 11 Ch. Div. 645. (This case should also be consulted for the discussion by the M.R. of the doctrine of restraint on anticipation.) See also *Cooper* v. *Laroche*, 17 Ch. Div. 368; *Herbert* v. *Webster*, 15 Ch. Div. 610 (where the settlement was post-nuptial and the daughters were living when it was made).

(*m*) Co. Litt. 51 b, 52 b.

the principal having been alive at the time of its being acted upon (*n*). Where it had not been given for valuable consideration, it was also revocable at any time by the donor, and was liable to be suspended by his mental incapacity; therefore, in every such case, it was further necessary that inquiry should be made whether the power had been revoked prior to its apparent or proposed exercise (*o*). Where the conveyance, on sale or mortgage, was executed by attorney, the practice was to retain, or deposit in the names of trustees at the risk of the vendor or mortgagor, the purchase or mortgage-money, until satisfactory evidence had been adduced of the validity of the power at the date of the execution of the conveyance (*p*).

Now in cases falling within the Conveyancing Act, 1882 (*q*), it is unnecessary for a purchaser (*r*) to ascertain the facts of the principal being alive and the power being in force at the time of the conveyance being executed. The cases provided for by the Conveyancing Act, 1882, are in favour of purchasers, where the power of attorney has been created by an instrument executed after 1882, and either is given for a valuable consideration, and in the instrument creating it is expressed to be irrevocable (*s*), or, whether given for a valuable consideration or not, is in the instrument creating it expressed to be irrevocable for a fixed time therein specified, not exceeding one year from the date of the instrument (*t*).

Married Woman.

A married woman could not formerly appoint an attorney except, perhaps, with the consent of her husband (*u*), and, therefore, any assurance of a married woman's interest under a power of attorney was inoperative (*x*).

By the Conveyancing and Law of Property Act, 1881 (*y*), a married woman, whether an infant or not, is authorized to

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(*n*) Note to *Smart* v. *Sanders*, 5 C. B. 917: and Dart, V. & P. 352.

(*o*) *Ib.*, and 641.

(*p*) Dart, V. & P. 748.

(*q*) 45 & 46 Vict. c. 39, ss. 8, 9.

(*r*) "Purchaser" in the Conveyancing Acts, 1881, 1882, includes a lessee or mortgagee and an intending purchaser, lessee, or mortgagee, or other person who for valuable consideration takes or deals for any property; 44 & 45 Vict. c. 41, s. 2 (viii.); and 45 & 46 Vict. c. 39, s. 1 (4) (ii.).

(*s*) 45 & 46 Vict. c. 39, s. 8.

(*t*) *Ib.* s. 9.

(*u*) *Cooper's Case*, 2 Leon. 200; *Anon.* v. *Hopkins*, Cro. Car. 165. See also *White* v. *Greenish*, 11 C. B. (N. S.), at p. 230.

(*x*) *Graham* v. *Jackson*, 6 Q. B. 839, *per* Patteson, J.; and Dart, V. & P. 642.

(*y*) 44 & 45 Vict. c. 41, s. 40.

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appoint an attorney, after 1881, to execute any deed, or do any other act which she might herself execute or do.

Delegation.

The power cannot be delegated (*z*), nor can a deputy be appointed by the attorney, unless the deed conferring the power expressly authorizes such delegation or appointment (*a*).

56 & 57 Vict. c. 53.

In order to protect trustees and personal representatives, making payments or doing acts in pursuance of a power of attorney, it is enacted by the Trustee Act, 1893 (*b*), as follows:—

> "A trustee (*c*), acting or paying money in good faith under or in pursuance of any power of attorney, shall not be liable for any such act or payment by reason of the fact that at the time of the payment or act, the person who gave the power of attorney was dead, or had done some act to avoid the power, if this fact was not known to the trustee at the time of his so acting or paying. Provided that nothing in this section shall affect the right of any person entitled to the money against the person to whom the payment is made, and that the person so entitled shall have the same remedy against the person to whom the payment is made as he would have had against the trustee."

Conveyancing Acts, 1881, 1882.

Similar protection, as regards payments and acts made and done after 1881, has been given by the Conveyancing and Law of Property Act, 1881 (*d*), to all persons acting in good faith.

Mode of Execution by Attorney.

Where a deed is executed under power of attorney, the principal and not the attorney is named as party to the deed, and the practice used to be for the attorney to execute in the name of the principal, and the fact to be noticed in the attestation (*e*): but at the present day (*f*) the donee of a power of attorney may, at whatever date the power was created, if he thinks fit, execute any assurance, instrument, or thing in and with his own name and signature and seal, by the authority of the donor of the power.

Fraud on Power.

Finally, it should be noticed, with respect to "special" powers, that an appointment, though on the face of it valid as being within the terms of the power, may, in some cases, be set aside as invalid in equity, on the ground that it is what is called a "fraud on the power," that is, "an abuse of it, or, in other words, an

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(*z*) *Ante*, p. 303.

(*a*) See 1 Dav. Prec. 476, note.

(*b*) 56 & 57 Vict. c. 53, s. 23, replacing similar provisions of the Law of Property Amendment Act, 1859; 22 & 23 Vict. c. 35 ("Lord St. Leonards' Act").

(*c*) "Trustee" includes executor or administrator; *ib.* s. 50.

(*d*) 44 & 45 Vict. c. 41, s. 47.

(*e*) Dart, V. & P. 589 and 642. See form in 1 K. & E. 614.

(*f*) 44 & 45 Vict. c. 41, s. 46.

exercise of it for some purpose different from that for which the power was conferred" (*g*); as, for instance, where the donee of the power makes the appointment in pursuance of an agreement or bargain that he, or some other person not an object of the power, is to receive part of the property appointed, or some other benefit in consideration of the appointment. But this is a subject which is not within the scope of the present work, and as to which the authorities upon equitable jurisprudence must be consulted (*h*).

(*g*) *Per* Lindley, L.J., *Henty* v. *Wrey*, 21 Ch. Div. 332, at 354.

(*h*) See Farw. Pow., Ch. X.; *Aleyn* v. *Belchier*, 1 Eden, 132; S. C., with notes, in 1 W. & T.

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CHAPTER XII.

COPYHOLDS.

"TENANT by copy of Court Roll is, as if a man be seised of a manor, within which manor there is a custom (*a*) which hath been used time out of mind of man, that certain tenants within the same manor have used to have lands and tenements to hold to them and their heirs in fee simple, or fee tail, or for term of life, &c., at the will of the lord, according to the custom of the said manor" (*b*).

Manor.

A manor (*c*) is an aggregate of rights vested in the lord, including rights in respect of lands, and also certain rights of jurisdiction. The lands comprised within the manor are—(1) *demesne* lands (*d*), of which the freehold is vested in the lord; and (2) *tenemental* lands, which are lands held of the lord by freehold tenants, and in regard to which the lord has a seignory, and is entitled to the services by which they are holden (*e*). The demesne lands comprise lands in the occupation of the lord himself or of his lessees for years, or of his customary tenants, and also the waste lands. The rights of the lord in the waste lands are generally subject to rights of common (*f*) enjoyed by the tenants of the manor, whether freeholders or customary tenants. A Court known as the Court Baron, of which the

(*a*) *I.e.*, customary law.

(*b*) Litt. s. 73. Some interesting information as to the origin of copyholds will be found in Seebohm, Eng. Village Community, *passim;* Maine, Village Communities, Lect. iii. and v.; Early Law and Custom, pp. 302, 319, and note (A), p. 329; P. & M. Hist. i., p. 351. See also 1 Cruise, Dig. 42, and as to copyholds generally, 1 Cruise, Dig. Tit. x., pp. 253, *et seq.;* Watk. Cop.

(*c*) See P. & M. Hist. i., p. 343; Elph. N. & C. Interp. 592, s.v. "Manor;" Perk. Prof. Bk., s. 128; Burton, Comp. (1023); 1 Watk. Cop., Ch. I.; 15 Vin. Ab., "Manor;" Gray's Cases on Property, vol. i., p. 387. Prof. Maitland says that in Domesday Book the word *manerium* had a technical meaning connected with the levy of the danegeld. He defines a manor at that date as "A house against which geld is charged;" Domesday Book and Beyond, pp. 107—128.

(*d*) See as to the meaning of *demesne*, Elph. N. & C. Interp., p. 570.

(*e*) See Co. Litt. 17 a; *Att.-Gen.* v. *Parsons*, 2 Cr. & J. 279.

(*f*) See as to these, *post*, p. 347; and Williams on Rights of Common.

freehold tenants of the manor are judges, is incidental to the manor, and there is also usually a customary Court, which concerns the copyholders, and of which the lord or the steward is judge (*g*).

It is essential to the existence of a manor that there should be freehold tenants holding of the lord, and therefore every manor must have been created before the Statute of *Quia Emptores* (18 Edwd. I., A.D. 1289—90), since no subject could after that statute grant a freehold estate in fee simple to be holden of himself (*h*).

"Reputed Manor."

If all the freeholds held of the manor are acquired by the lord, which may happen by descent, purchase, or escheat, the manor ceases to exist, and is then called a "reputed manor" (*i*).

"Seignory."

If all the demesne lands are alienated, the manor ceases to exist and becomes a "seignory" (*k*).

Copyholds are part of demesnes.

In most manors there are lands held by customary tenants, and known as copyholds. These are part of the demesnes, and the freehold and seisin are in the lord (*l*). The lord is therefore the terre-tenant of copyhold lands with respect to the Crown or other chief lord of whom the lands are held; and the timber trees upon the land, and the minerals under it, belong, not to the copyholder, but to his lord, who, however, in the absence of custom, "cannot get either the one or the other, so that the minerals must remain unworked and the trees uncut. The possession is in the copyholder, the property is in the lord" (*m*).

Timber and minerals.

This seems to be a consequence of the fact that a copyholder is at Common law a mere tenant at will, and, as such, he has no right to commit waste, voluntary or permissive (*n*). "It is the

(*g*) As to the Courts of the manor, see Co. Litt. 58 a, *et seq.*; 4th Instit. 268; 2 Selden Society's Publ.; 5 L. Q. R. 123; 7 Vin. Ab. "Court," E. a. As to the customary Court, see Copyhold Act, 1894 (57 & 58 Vict. c. 46), s. 82, *post*, p. 336.

(*h*) There may be an exception in the case of manors created by tenants *in capite* with licence from the Crown; *Delacherois* v. *Delacherois*, 4 N. R. 501; S. C., not reported on this point, 11 H. L. C. 62.

(*i*) Some authorities lay it down that, if all the freeholds but one are acquired by the lord, the manor becomes a reputed manor; on the ground that a manor cannot exist without a Court Baron, which cannot be held unless there are two freehold tenants at the least; *Glover* v. *Lane*, 3 T. R. 445; *Bradshaw* v. *Lawson*, 4 T. R. 443.

(*k*) *Sir Moyle Finch's Case*, 6 Rep. 63.

(*l*) Wms. R. P. 434. "Copyhold lands are as the demesnes of the manor and are the lord's freehold;" *Pymmock* v. *Hilder*, Cro. Jac. 559.

(*m*) *Per* Jessel, M.R., *Eardley* v. *Granville*, 3 Ch. Div. 826, 832.

(*n*) 1 Watk. Cop., p. 398; Scriv. Cop., p. 213; Williams on Seisin, 40; Leake, Law of Prop. in Land, 86.

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custom of the manor that decides all the rights of the copyhold tenant. Without that, he is a tenant at will; and, if there were not a custom of a manor, he would have no rights at all" (*o*). In some manors there are customs for the copyholder to take the timber or minerals, or for the lord to do so, making compensation for damage to the surface (*p*).

"Customary freeholds."

In some manors there are lands which are held by copy of Court Roll according to the custom of the manor, but not "at the will of the lord." These are, according to a learned writer (*q*), "merely a privileged and superior kind of copyholds;" and the freehold of them is in the lord, and not in the tenant. They are sometimes called "customary freeholds," and are to be distinguished from such freehold lands as are subject by custom to some peculiar mode of alienation, of which the freehold is in the tenant, not the lord (*r*).

Copyhold grants of the waste.

In some manors there is a custom for the lord, generally with the consent of the homage (*s*), to grant new copyholds out of the waste (*t*); but by the Copyhold Act, 1887 (*u*), it was enacted that no such grant made after the 16th September, 1887, should be valid without the consent of the Board of Agriculture (*x*), and the effect of such a grant since that date is that the land "shall cease to be of copyhold tenure," and shall be vested in the grantee to hold "as in free and common socage." These provisions are now replaced by those of the Copyhold Act, 1894 (*y*), to the same effect.

(*o*) *Per* Rigby, L.J., *Western* v. *Bailey*, [1897] 1 Q. B. 86, at p. 91.

(*p*) *Per* Mellish, L.J., *Aspden* v. *Seddon*, 1 Ex. Div. 496, at p. 510; 1 Watk. Cop., p. 405, note.

(*q*) Williams on Seisin, 49; Wms. R. P. 436.

(*r*) See Williams on Seisin, 129, referring to *Perryman's Case*, 5 Rep. 84.

(*s*) 1 Watk. Cop. 35. The "homage" properly speaking appears to mean the freeholders assembled in the Court Baron (of which they were judges), as freeholders alone can do homage to the lord, see Co. Litt. 64 a, note 1. But as the Court of the freeholders and the customary Court (in which the steward was judge, and which was attended by a jury of copyholders) were often, if not generally, held together, the consent of the homage acquired the meaning of consent of the tenants of the manor, whether freeholders or copyholders, given in the Manor Court. For an instance of the "homage" being a jury of copyholders, see *Lascelles* v. *Onslow*, 2 Q. B. D. 433.

(*t*) 1 Cruise, Dig. 263; Williams on Rights of Common, 123, 129. As to whether a sufficiency of common must be left, see *Ramsey* v. *Cruddas*, [1893] 1 Q. B. 228. See, as to the necessity of holding a Court in such cases, Copyhold Act, 1894 (57 & 58 Vict. c. 46), s. 82 (2) (b), 83, replacing 4 & 5 Vict. c. 35, s. 91.

(*u*) 50 & 51 Vict. c. 73, s. 6.

(*x*) Substituted by the Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30), for the Land Commissioners.

(*y*) 57 & 58 Vict. c. 46, s. 81.

Incidents of copyhold tenure—fines, &c.

The services due from the copyhold tenants depend upon the various customs of the different manors. They invariably include fealty and suit of Court; they sometimes include a rent, a fine (*i.e.*, a sum of money), payable on the death of a tenant, and sometimes also on that of the lord; a fine (often improperly called a relief) payable on alienation; and a heriot on the death of, or alienation by, a tenant, or sometimes on his alienation only (*z*).

Customary estates.

Though no copyholder has, at Common law, more than an estate at will, yet copyholders may have customary estates for life or of inheritance, analogous to estates in freehold lands, and they are then spoken of as tenants for life, in tail, or in fee simple, as the case may be (*a*).

Estate tail in copyholds.

The question whether copyholds could be granted for an estate in tail was formerly much debated (*b*). It is now settled that such an estate can be created only in manors in which there is a special custom to that effect (*c*), and that the *onus* of proving the custom lies on the person who sets it up (*d*). Where there is no such custom, words of limitation which create an estate tail in freeholds create a fee simple conditional in copyholds (*e*).

Mode of alienation.

As copyholders are in law mere tenants at will, they cannot alienate their estates by feoffment, or any other Common law assurance. And the Statute of Uses does not apply to copyholds, because the copyholder is not seised of them.

Statute of Uses.

Surrender and admittance.

By the custom of the manor, the copyholder has the power of transferring his estate by surrendering it to the lord to the intent that the lord may grant it out to another person named in the surrender (*f*). The new grant by the lord is called an admittance. The surrenders and admittances are entered in the rolls of the Manor Court, and copies of these entries are the evidences of title of the tenant, whence he is said to hold by copy of Court Roll.

(*z*) As to fines, see 1 Watk. Cop., Ch. VII.; Scriv. Cop. 180, *et seq.*, and *post*, p. 332. As to heriots, see 2 Watk. Cop., Ch. VI.; Scriv. Cop. 244, and *post*, p. 332.

(*a*) See Litt. ss. 77, 81; Co. Litt. 60 b, 62 b.

(*b*) See Co. Litt. 60 b; Gilbert, Tenures, [165]; 1 Cruise, Dig. 273, *et seq.*; Wms. R. P. 440, *et seq.*; and the authorities collected in Scriv. Cop. 44.

(*c*) *Roe* d. *Crowe* v. *Baldwere*, 5 T. R. 104; *Heydon's Case*, 3 Rep. 7 a; Litt. s. 73.

(*d*) *Moore* v. *Moore*, 2 Ves. Sen. 602.

(*e*) Elph. N. & C. Interp. 241; *Re Catling's Estate*, W. N., 1890, p. 146; S. C. 6 T. L. R. 417; *Doe* v. *Clark*, 5 B. & Ald. 462.

(*f*) See forms of surrender in 1 K. & E. 434, 632; Stud. Prec. 21.

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In most manors the process of conveyance formerly consisted of three parts; *first*, a surrender by the tenant of the lord to such uses (*g*) for such persons as were specified in the surrender; *second*, a presentment of the surrender on oath by the jury, or homage, of the manor in open Court; and *third*, the admittance of the new tenant by the lord, consisting of a grant of the land to him to hold by the rents and services "therefor due and of right accustomed," followed by symbolical delivery of the land by handing the new tenant a rod, or verge (*h*), or a glove or some other thing, as the custom required, and by entry of the admission on the Court Rolls (*i*).

Covenant to surrender.

In practice, on a sale of copyholds, the vendor enters into a covenant to surrender to the use of the purchaser (*k*), which does not confer any legal estate on the purchaser; but only an equitable interest which enables the purchaser to obtain a vesting order, and probably an order appointing some person to convey the copyholds (*l*). In order to pass the legal estate there must be a surrender by the vendor followed by the admittance of the purchaser.

Any person who can convey freehold land by a Common law assurance can surrender his copyhold (*m*).

Husband and wife.

A surrender might always be made by a man to the use of his wife, because the wife takes by the admittance, which is the act of the lord (*n*). In the absence of a special custom, husband and wife can surrender the wife's copyholds if she be privately examined by the steward; and by special custom the examination may be taken by two copyholders of the manor (*o*). If the

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(*g*) The word "use" is here used somewhat in its old sense of "trust," and as indicating that the lord was bound to admit the persons specified.

(*h*) Hence copyholders are sometimes called tenants "by the verge;" Co. Litt. 61 a.

(*i*) Acts of the lord which indicate his acceptance of a person as his tenant, *e.g.*, the taking of quit-rents, may amount to an implied admittance; *Ecclesiastical Commissioners* v. *Parr*, [1894] 2 Q. B. 420.

(*k*) See forms in Stud. Prec. 20; 1 K. & E. 433.

(*l*) *Re Cuming*, L. R. 5 Ch. 72; *Re Crowe's Mortgage*, L. R. 13 Eq. 26.

(*m*) 5 Cruise, Dig. 450. An infant may be bound by his surrender under a special custom; *Hughes* v. *Carpenter*, Toth. 278; *Lyde* v. *Semister*, Toth. 173; *Nayler* v. *Strode*, 2 Rep. Ch. 392. If there is no such custom of the manor, his surrender is voidable, and not *ipso facto* void, where it be either beneficial to him or beneficial to others and not harmful to him; *Zouch* v. *Parsons*, 3 Burr. 1806; *Grange* v. *Tring*, O. Bridg. 117.

(*n*) *Bunting* v. *Lepingwell*, 4 Rep. 29 a.

(*o*) *Driver* d. *Berry* v. *Thompson*, 4 Taunt. 294.

wife acquired the copyhold after 1882, she can by virtue of the Married Women's Property Act, 1882 (*p*), surrender it without her husband's concurrence.

Surrender by person who has not been admitted.

In general the tenant on the rolls, *i.e.*, a person who has been admitted, is the only person who can surrender; but this rule is subject to some exceptions, viz.:—(1) The customary heir can surrender before admittance, but he must pay the fine due on the descent to him (*q*).

(2) Admittance of a tenant for life or years is a sufficient admittance of all remaindermen (even if their estates were originally contingent) to enable the latter to surrender; but a fine must be paid where there is a custom to that effect, on the admittance of the tenant for life and also on the admittance of the remainderman (*r*).

Equitable interest.

(3) A person entitled to an equitable estate tail, can bar it by surrender under the Fines and Recoveries Act, 1833 (*s*).

Tenant for life.

(4) A tenant for life (or person having under the Settled Land Act, 1882 (*t*), the powers of a tenant for life) can, on a sale, exchange, partition, lease, mortgage, or charge, made under the powers conferred by the Act, convey by deed settled copyholds vested in trustees. The deed must be entered on the Court Rolls, and a person whose title under the deed requires to be perfected by admittance is entitled to be admitted without any surrender (*u*).

Joint tenants; tenants in common.

The admittance of one of several joint tenants is the admittance of all, as they all compose but one tenant to the lord; and so as to coparceners; but tenants in common take several estates and must be severally admitted (*x*).

(*p*) 45 & 46 Vict. c. 75.

(*q*) *Brown's Case*, 4 Rep., at 22 b.

(*r*) The reason is said to be that the particular estate and remainders over form but one estate at law. 1 Watk. Cop. 276; *ib.* 296; 1 Cruise, Dig. 294; *Auncelme* v. *Auncelme*, Cro. Jac. 31; *Barnes* v. *Corke*, 3 Lev. 308; *Dean of Ely* v. *Caldecot*, 8 Bing. 439; *Rex* v. *Lord of the Manor of Woodham Walter*, 10 B. & S. 439; *Smith* v. *Glasscock*, 4 C. B., N. S. 357. From these authorities it would appear that, by the *general* custom of copyholds, the admittance of the tenant for life (or other tenant for a particular estate) is the admittance of the remainderman; and that generally, where the full fine was paid by the tenant for life on the admittance, no fine is payable by the remainderman on the death of the tenant for life; but that, in some manors, by special custom, the lord is entitled to a further fine from the remainderman on the death of the tenant for life, though probably, even in these cases, no formal admittance of the remainderman can be compelled, unless the special custom of the particular manor requires this also.

(*s*) 3 & 4 Will. IV. c. 74, s. 50.

(*t*) 45 & 46 Vict. c. 38, s. 20 (1), (3).

(*u*) *Ib.* s. 20 (3).

(*x*) 1 Watk. Cop. 277, 298.

Surrender in or out of Court.

A surrender may be made either in or out of Court, to the lord in person, or to the steward or deputy steward (*y*), even if appointed by parol only (*z*); and in some manors by special custom the surrender may be made out of Court to some of the copyholders, or to the bailiff or reeve (*a*). It was formerly necessary that a surrender made out of Court should be presented at the next Court; and, if not so presented, it became void (*b*), unless the custom allowed it to be presented at a subsequent Court (*c*). But, by the Copyhold Act, 1894, repealing and (s. 85) re-enacting the Copyhold Act, 1841 (s. 89), entry on the Court Rolls is now sufficient without presentment.

Surrenders and admittances by attorney.

A copyholder could always surrender by attorney (*d*) but formerly he could not insist upon being admitted by attorney, because he could not do fealty by attorney. After 16th September, 1887, the Copyhold Act, 1887, enabled him to be admitted by his attorney, appointed orally or in writing; and this provision is now replaced by a similar enactment in the Copyhold Act, 1894 (*e*).

Surrender to person not in existence, or not capable.

At Common law a grantee not in existence at the time of the grant cannot take. But if a surrender of copyholds be made to the use of a person not in existence at the time of the surrender, or not then capable of taking, it takes effect if he be in existence or capable of taking at the time of the admittance. For instance, a surrender to the use of the heir of A., a living person, is good if A. dies before the admittance (*f*).

Discrepancy between surrender and admittance.

The lord is a mere instrument in admitting the tenant (*g*); and therefore if there be a discrepancy between the surrender and the admittance as to the person admitted, the estate for which he is admitted, or otherwise, the admittance is good only so far as it is in accordance with the surrender (*h*).

Admittance relates back to surrender.

Until admittance the surrenderee has only an equitable interest,

(*y*) *Parker* v. *Kett*, 1 Ld. Raym. 658; 1 Watk. Cop. 73.

(*z*) *Lady Holcroft's Case*, 4 Rep. 30 a.

(*a*) Co. Litt. 59 a.

(*b*) Co. Litt. 62 a. The vendor's solicitor is often appointed deputy steward for the purpose of taking his surrender.

(*c*) *Fawcett* v. *Lowther*, 2 Ves., at p. 302. "Presentment is properly that which the jurors find and present to the Court without any former indictment delivered to them;" Coke, 2nd Instit. 739.

(*d*) As to surrender by attorney, see *Combes' Case*, 9 Rep. 75 a; *Mitchel* v. *Neale*, 2 Ves. Sen. 679.

(*e*) 57 & 58 Vict. c. 46, s. 84 (2).

(*f*) Coke, Cop. 35; Gilbert, Tenures, 263.

(*g*) 1 Watk. Cop. 281.

(*h*) *Bunting* v. *Lepingwell*, 4 Rep. 29 a; *Westwick* v. *Wyer*, 4 Rep. 28 a.

but on admittance he acquires the legal estate as from the time of the surrender as against all persons except the lord (*i*). The result is that, if the surrenderor dies before the admittance of the surrenderee, his widow is not entitled to freebench; and that, if he is a joint tenant, the joint tenancy is severed by the surrender. Conversely, if the surrenderee in fee dies before admittance, his widow is entitled to freebench (*k*), and his heir is entitled to be admitted by descent (*l*).

Contingent remainder.

A contingent remainder in copyholds is not destroyed by the surrender of the particular estate (*m*); but, on the other hand, where the estate is given to A. for life, with remainder to the heirs of B., and A. dies in B.'s lifetime, the heir cannot take. If, however, A. commits a forfeiture or surrenders, and afterwards B. dies in A.'s lifetime, the heir takes (*n*).

Surrenderor continues tenant.

On a surrender of a copyhold of inheritance no estate passes to the lord, but it remains, till the surrenderee be admitted, in the surrenderor; and he continues tenant and liable to answer the services (*o*).

Curtesy.

The extent of the interest taken by a husband in his wife's copyholds depends upon the custom of the particular manor (*p*). The custom generally follows the rules of Common law as to tenancy by the curtesy, and sometimes it is an estate during the joint lives of the husband and wife, and an estate in one moiety to the surviving husband so long only as he remains unmarried whether issue be born or not (*q*). Whatever be the custom, the rights of the husband are subject to the rights conferred on the wife by the Married Women's Property Act, 1882 (*r*).

Freebench (*s*).

The interest of a widow in her husband's copyholds, which is called "freebench," and is not affected by the Dower Act, 1833 (*t*), depends upon the custom of the manor. Generally she takes a third for her life, as at Common law; and generally she has freebench only in the lands of which her husband dies seised, so that a surrender by the husband, followed by admittance of the

(*i*) Co. Litt. 59 b; *Porter* v. *Porter*, Cro. Jac. 100; *Benson* v. *Scot*, 1 Salk. 185: *Doe* v. *Hall*, 13 East, 208.

(*k*) *Vaughan* v. *Atkins*, 5 Burr. 2764.

(*l*) *Blunt* v. *Clark*, 2 Sid. 61; see further as to admittances, *post*, p. 336.

(*m*) Fearne, C. R. 319.

(*n*) *Ib.* 320.

(*o*) Co. Cop. 39; 1 Watk. Cop. 94.

(*p*) *Ever* v. *Aston*, Moo. 271; 2 Watk. Cop. 92.

(*q*) Scriv. Cop. 74; 1 Cruise, Dig. 290.

(*r*) 45 & 46 Vict. c. 75.

(*s*) Scriv. Cop. 69, *et seq.*; 1 Cruise, Dig. 284, *et seq.*; 2 Watk. Cop. 73.

(*t*) 3 & 4 Will. IV. c. 105; *Smith* v. *Adams*, 5 De G. M. & G. 712.

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surrenderee even after his death, or a contract for sale made by the husband (*u*), will defeat the widow's freebench. Sometimes, however, she takes an estate greater or less than a third, even, in one instance at least, the entire inheritance; and sometimes by marriage she acquires an inchoate title to freebench which will not be barred by her husband's alienation. As the widow's freebench is a continuation of the husband's estate, she does not (except by special custom) require to be admitted (*x*).

Descent.

Most copyhold tenements are descendible according to the custom of the manor, and, subject to the custom, according to the rules of the Common law (*y*).

Devise of copyholds.

Before the 12th July, 1815, copyholds could not be devised except in manors where there was a special custom. In manors where there was no such custom, the copyholder made a surrender to the use of his will, and the estate passed by the surrender and not by the will, which merely operated as a declaration of the uses of the surrender (*z*). By 55 Geo. III. c. 192, all devises thereafter made of copyholds, though not surrendered to the use of the testator's will, were rendered as valid as if they had been so surrendered. This Act gave no new testamentary power, but merely supplied the want of a surrender.

Before 1838, though the heir of a deceased tenant on the roll could devise before admittance (*a*), a devise by a surrenderee or devisee of copyholds, made before admittance, did not pass the legal estate (*b*), and the person claiming under such a devise took no legal interest, even if he were admitted (*c*); and where the devise was to a stranger, the heir was, generally speaking, not bound to give effect to it, so that the devisee took no equitable interest (*d*); but in some cases, where the devise was in favour of a widow (*e*), or younger children (*f*), unless the heir was totally unprovided for (*g*), or where the devise was for the benefit of creditors (*h*), equity supplied the want of a surrender.

(*u*) *Hinton* v. *Hinton*, 2 Ves. Sen. 631.

(*x*) *Chapman* v. *Sharpe*, 2 Show, 184.

(*y*) *Brown's Case*, 4 Rep., at 22 a.

(*z*) *Semaine* v. *Anon.*, 1 Bulst. 200; *Att.-Gen.* v. *Vigor*, 8 Ves., at p. 286.

(*a*) *Right* d. *Taylor* v. *Banks*, 3 B. & Ad. 664.

(*b*) *Wainewright* v. *Elwell*, 1 Madd. 627; *Matthew* v. *Osborne*, 13 C. B. 919, a case worthy of careful perusal.

(*c*) *Matthew* v. *Osborne*, 13 C. B. 919.

(*d*) *Wainewright* v. *Elwell*, 1 Madd. 627.

(*e*) *Hills* v. *Downton*, 5 Ves. 557; *Fielding* v. *Winwood*, 16 Ves. 90.

(*f*) *Garn* v. *Garn*, 16 Ves. 268.

(*g*) *Hawkins* v. *Leigh*, 1 Atk. 387.

(*h*) *Ithel* v. *Bean*, 1 Dick. 132.

The law was altered by the Wills Act, 1837 (7 Will. IV. & 1 Vict. c. 26), which (s. 3) enables a person by his will, made or revived after 1837, to dispose of all real estate "to which he shall be entitled, either at law or in equity, at the time of his death, and which, if not so devised, bequeathed, or disposed of, would devolve upon the heir at law or customary heir of him, or, if he became entitled by descent, of his ancestor." In the case of copyholds, this power of devise is exerciseable "notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that, being entitled as heir, devisee or otherwise to be admitted thereto, he shall not have been admitted thereto:" and notwithstanding any special custom which, but for the Act, would have prevented the devise. The estate vests in the heir until the admittance of the devisee (*i*); and a devise has the same effect as if a surrender had been actually made to the use of the will (*k*).

Power of sale in will.

It has been decided that a copyholder may give a power of sale to his executors, or other persons named in that behalf in his will (*l*), and that, if they can sell under the power before the lord can seize *quousque* (*m*), their appointee has a right to be admitted without any admittance of and surrender by the devisee or heir (*n*). The lord is entitled to have a tenant on the rolls, and therefore where, upon a tenant's death, his heir does not tender himself for admittance within the time prescribed by the custom, proclamation is made for him to come and be admitted at the next Court. If he fails to come at that Court, further proclamations are made at the two or three following Courts, according to the custom. If he fails to appear on the last proclamation, the lord may seize the tenement into his own hands *quousque*, *i.e.*, until the heir comes in to be admitted (*p*).

Seizure *quousque* (*o*).

(*i*) *Garland* v. *Mead*, L. R. 6 Q. B. 441.

(*k*) *Lacey* v. *Hill*, L. R. 19 Eq. 346.

(*l*) *Beal* v. *Shepherd*, Cro. Jac. 199; *Holder* v. *Preston*, 2 Wils. 400; *Glass* v. *Richardson*, 9 Hare, 698; S. C. 2 D. M. & G. 658; *Reg.* v. *Wilson*, 3 B. & S. 201.

(*m*) *I.e.*, until a tenant appear to claim admittance; see *Doe* v. *Trueman*, 1 B. & Ad. 736.

(*n*) In the absence of special custom, a devise of copyholds "to such uses as A. shall appoint, and, in default of appointment, to the use of A." or "of B.," does not enable A. by an exercise of the power, to confer on his appointee a right to be admitted, so as to avoid the necessity of some person being admitted who would afterwards surrender to the use of the appointee; see *Flack* v. *Downing College*, 13 C. B. 945; S. C. 22 L. J. C. P. 229.

(*o*) Wms. R. P. 459.

(*p*) See 1 Watk. Cop. 234. The proceedings must strictly follow the custom;

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In like manner the lord can seize *quousque* in the case of a devisee (*q*); or of a remainderman, where the custom requires him to be admitted on the determination of the particular estate. In the latter case the proclamations may be in general terms for any person to come and make title (*r*). The custom may even authorize seizure *quousque* in the case of a surrenderee after three proclamations; but this is extremely rare (*s*).

Mortgages of copyholds (*t*).

Mortgages of copyholds are generally effected by means of a covenant to surrender followed by a conditional surrender (*u*), which is at once entered on the Court Rolls. It results from the principles above laid down that, if the mortgagee is admitted in pursuance of the surrender, he obtains priority over all estates created by surrenders subsequent to the conditional surrender, even if admittances have been made upon them.

Corporation.

The lord is not bound to admit on a surrender which is contrary to the custom of the manor; nor to admit a corporation, because, as a corporation never dies, he would lose fines payable on the death of the tenant (*x*).

Bankruptcy.

The copyholds of a bankrupt vest in his trustee in bankruptcy, who, however, cannot be compelled to take admittance, but may deal with them as if they had been surrendered to such uses as the trustee should appoint; and his appointee is entitled to admittance (*y*).

Vesting orders.

Where a vesting order of copyholds is made with the consent of the lord, under the Trustee Act, 1893 (*z*), the lands vest accordingly without surrender or admittance; and where an order is made appointing a person to convey copyhold lands, he may surrender, and the lord is bound to admit on the surrender, as if the person in whose place the appointment is made had been free from disability and had made the surrender. In the case of lunatic trustees or mortgagees, similar provisions are

Lunatics.

Doe v. *Hellier*, 3 T. R. 162. There may be a custom for the lord to seize as for an absolute forfeiture on the heir not presenting himself for admittance; *Salisburie's Case*, 1 Keb. 287.

(*q*) *Roe* d. *Ashton* v. *Hutton*, 2 Wils. 162.

(*r*) *Doe* d. *Whitbread* v. *Jenney*, 5 East, 522.

(*s*) *Baspole* v. *Long*, Yelv. 1; 1 Watk. Cop. 237; for, as there observed, the surrenderor remains tenant.

(*t*) See 37 Sol. J., pp. 712, 727.

(*u*) See Elph. Introd. 171, and forms in Stud. Prec., pp. 56, 59; 2 K. & E. 72, 74.

(*x*) Before the Naturalization Act, 1870 (33 Vict. c. 14), the lord was not bound to admit an alien.

(*y*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 50 (4).

(*z*) 56 & 57 Vict. c. 53, s. 34, re-enacting 13 & 14 Vict. c. 60, s. 28.

contained in the Lunacy Act, 1890 (*a*), and the committee of a lunatic so found by inquisition can surrender the lunatic's copyholds in pursuance of an order made for the sale of the lunatic's land under the Lunacy Act, 1890 (*b*); and a lunatic entitled to admittance may be admitted by his committee, or on default by him, by an attorney appointed by the lord (*c*).

Forfeiture (*d*).

Formerly copyholds were forfeited to the lord (not to the Crown) on the attainder of the tenant of high treason or felony (*e*), but forfeiture for these causes is abolished by the Forfeiture Act, 1870 (*f*), and the Act appears to be applicable to copyholds.

It is a cause of forfeiture if the tenant conveys copyholds by deed or feoffment (*g*) or makes a lease for more than one year (*h*), except under a special custom, or with licence from the lord (*i*).

Forfeiture is also incurred by the refusal or neglect of the tenant to perform the services due in respect of his tenement (*k*), as, for instance, if he refuses to perform suit to his lord's Court after sufficient warning (*l*).

(*a*) 53 Vict. c. 5, s. 135, sub-ss. (5) and (6).

(*b*) *Ib.* ss. 120, 124.

(*c*) *Ib.* ss. 125, 126.

(*d*) See generally as to causes of forfeiture, 1 Watk. Cop., Ch. VIII.

(*e*) But not on conviction only, unless there was a special custom; *R.* v. *Willes*, 3 B. & Ald. 510. See, as to the difference between conviction and attainder, *post*, p. 380, note (*b*).

(*f*) 33 & 34 Vict. c. 23; *post*, p. 381.

(*g*) 1 Watk. Cop. 327; so formerly if he levied a fine or suffered a recovery. See, as to these causes of forfeiture, Co. Litt. 59 a; *Taverner and Cromwell's Case*, 4 Rep. 27 a; *Doe* v. *Hellier*, 3 T. R., at p. 166. The question whether a forfeiture has been incurred in such cases would appear to depend on whether or not an estate passed by the act in question (Co. Litt, 59 a, Hargrave's note), so that no forfeiture would be caused by executing a charter of feoffment, without any livery of seisin. As, by the Real Property Act, 1845, corporeal hereditaments (which include copyholds) lie in grant, a common deed of grant passes an estate in copyholds, and therefore creates a forfeiture. But no instrument creating or passing a mere equitable interest creates a forfeiture. Copyholds not being within the Statute of Uses, it will be obvious that a bargain and sale enrolled or a release founded on a bargain and sale for a year is not a cause of forfeiture, as only an equitable interest passes. On the other hand, a release to a tenant in possession of the land under a lease for a year passes a legal interest, and therefore creates a forfeiture.

(*h*) But if the lease be for one year only with a covenant that at the expiration of the year the lessee shall have the lands for another year, and so on from year to year, it is no forfeiture; *Montague's Case*, Cro. Jac. 301; *Doe* v. *Clare*, 2 T. R. 739. And a lease made contrary to the custom is good against all but the lord; *Doe* d. *Robinson* v. *Bousfield*, 6 Q. B. 492.

(*i*) 1 Cruise, Dig. 284, 309; 1 Watk. Cop. 327; see, as to licences, the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 14, and the Copyhold Act, 1894 (57 & 58 Vict. c. 46), s. 86.

(*k*) *Grey* v. *Ulisses*, Latch, 122.

(*l*) *Buttevant* v. *Pickstaffe*, Roll. Rep. 429; *Hammond* v. *Wemibank*, 3 Bulst. 268. There is perhaps a question whether personal notice of the holding of the Court must be given; see the cases in 6 Vin. Abr. 129 ("Copyhold," M. c.).

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Where the tenant refuses to pay a rent due by the custom, it is a forfeiture, unless he refuses on the ground that he has no money, or makes some other excuse which does not deny the lord's right (*m*).

Waste.

If there be no custom to the contrary, waste, whether voluntary or permissive, works forfeiture of a copyhold (*n*). Even the destruction of a copyhold house by fire is waste, unless it is repaired within a convenient time, or the burning is by the act of God, as by lightning (*o*).

Fines.

A fine payable on the change of the tenant is a sum of money payable by custom to the lord on the admission of every tenant, for each tenement to which he is so admitted (*p*).

Fines are either certain, *i.e.*, fixed sums, according to the custom of the manor; or arbitrary, *i.e.*, a sum to be assessed at the will of the lord; but an arbitrary fine must be reasonable (*q*), and two years' improved value, deducting quit rents, is the largest sum allowed to be reasonable (*r*).

No fine is due till the tenant be actually admitted (*s*). Where the fine on admittance is certain, the tenant is bound to pay it immediately after admittance upon pain of forfeiture; but where it is arbitrary, refusal to pay the fine demanded, on the ground that it is larger than the custom warrants, is no forfeiture; and, even though a reasonable fine be assessed, the tenant has a reasonable time to discharge it, unless the custom fixes a certain day for payment (*t*).

Forfeiture for non-admittance or failure to pay the fine on admittance is prevented in the cases of infants and married women by the Infants' Property Act, 1830 (*u*); and in the case of lunatics by the Lunacy Act, 1890 (*x*).

Heriots (*y*).

The word *Heriot* is used in three different meanings, which

(*m*) Coke, Cop. 57.

(*n*) Co. Litt. 63 a; 1 Watk. Cop. 331.

(*o*) *Clifton* v. *Molineux*, 4 Rep. 27 a; *Rook* v. *Worth*, 1 Ves. Sen. 462.

(*p*) 1 Watk. Cop. 296.

(*q*) *Willowes' Case*, 13 Rep. 1.

(*r*) *Halton* v. *Hassel*, 2 Str. 1042; *Grant* v. *Astle*, 2 Doug. 723. This rule applies only where the lord is compellable to admit; 1 Watk. Cop. 308.

(*s*) 1 Watk. Cop. 286.

(*t*) *Dalton* v. *Hamond*, Cro. El. 779; *Gardiner* v. *Norman*, Cro. Jac. 617.

(*u*) 11 Geo. IV. & 1 Will. IV. c. 65; but, as to married women, these provisions are unnecessary in cases within the Married Women's Property Act, 1882. As to relief from forfeiture for non-payment of a rent or other money in the case of copyholds, see *Peachey* v. *Somerset*, Ab. Eq. 227; S. C., Pre. Ch. 568.

(*x*) 53 Vict. c. 5, s. 125, 126; *ante*, p. 331.

(*y*) See 2 Watk. Cop., Ch. VI.

must be distinguished. (1) Heriot service, which (perhaps) arises only from freeholds in respect of the tenure (*z*). It is extinguished by the purchase of part of the land by the lord (*a*). (2) Suit Heriot, which is a heriot reserved on a lease or a grant in fee simple since the Statute of *Quia Emptores* (*b*). (3) Heriot custom, which is a heriot due by the custom of the manor on the death of a freehold (*c*) or a copyhold tenant. It is not due on the death of a person who is only equitably entitled (*d*), and in the case of joint tenants or coparceners it is due only on the death of the survivor (*e*).

Rights of common.

Copyholders are generally entitled by the custom to certain rights of common on the wastes of the manor; and they may be entitled to similar rights over the lands of a stranger. In the latter case they must claim by prescription in the name of their lord (*f*).

Boundaries.

It is the duty of the copyholder to preserve the boundaries of his holding; and if he neglects to do so, the Chancery Division of the High Court will ascertain the boundaries, or, if that be impossible, will order an equivalent quantity of his land to be set out (*g*).

Destruction or extinguishment of copyhold.

A copyhold estate may be destroyed or extinguished not only by forfeiture (*supra*, p. 331), but also in other ways, viz.:— (1) By surrender (*h*) or release (*i*) to the lord. In such cases the land remains part of the demesnes of the manor. (2) By release

(*z*) See *Austin* v. *Bennet*, 1 Salk. 356; *Major* v. *Brandwood*, Cro. Car. 260; whether there can be heriot service in respect of a copyhold is doubtful; see *Western* v. *Bailey*, [1897] 1 Q. B. 86.

(*a*) *Talbot's Case*, 8 Rep. 104 b.

(*b*) See *Edwards* v. *Moseley*, Willes, 192.

(*c*) *Damerell* v. *Protheroe*, 10 Q. B. 20. There cannot be a good custom for the lord to have a heriot on the death of a person who is not his tenant; *Parker* v. *Comble-ford*, Cro. El. 725. The heriot may be seized out of the manor; *Western* v. *Bailey*, [1897] 1 Q. B. 86.

(*d*) *Trinity College* v. *Browne*, 1 Vern. 441.

(*e*) *Garland* v. *Jekyll*, 2 Bing., at p. 286; *Padwick* v. *Tyndall*, 1 E. & E. 191. See further as to these heriots, *Anon.*, 4 Leon. 239; *Bruerton's Case*, 6 Rep. 1; *Snag* v. *Fox*, Palm. 342; *Attree* v. *Scott*, 6 East, 476; 2 Watk. Cop. 131, *et seq.*

(*f*) Elph. N. & C. Interp. 614; *post*, Ch. XIII.

(*g*) See Elton, Cop. 228; Seton, pp. 1571, *et seq.* This may be done even after enfranchisement; see *Searle* v. *Cooke*, 43 Ch. Div. 519. The Board of Agriculture have certain powers for ascertaining the boundaries of copyholds under the Inclosure Act, 1846 (9 & 10 Vict. c. 70), s. 6.

(*h*) *Fisher* v. *Wigg*, 1 P. Wms. 17; and see 1 Watk. Cop., Ch. IX., and Elton, Cop. 349, as to extinguishment and suspension.

(*i*) *Bleverhasset* v. *Homberstone*, W. Jones, 41.

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Enfranchisement.

to a stranger to whom the lord has conveyed the freehold fee simple (*k*). (3) By enfranchisement, which is where the lord (or other owner of the freehold) conveys or releases to the copyholder the freehold estate in the land, or the seignorial rights in the land; and its effect is to change the tenure from base to free. The copyhold estate, with its incidents, is merged or destroyed; and as, since the Statute of *Quia Emptores*, the grantee cannot hold of the grantor, the lands are thenceforth held not of the lord of the manor, but of the next superior lord, of whom the lord of the manor held (*l*).

At Common law.

Enfranchisement may be either (a) at Common law, or under a power, by agreement between the lord and the tenant, or (b) statutory, under the Copyhold Act, 1894 (*m*).

(a) At Common law, it can be effectual only to the extent of the freehold estate belonging to the lord; for, if he has only a limited interest, *e.g.*, an estate for life, he cannot convey more, and the enfranchisement is not complete (*n*).

Under powers.

A lord who is a limited owner may, however, enfranchise under a power, created either by settlement (*o*) or by statute, as under the Settled Land Act, 1882 (*p*), which gives power to "sell the freehold and inheritance of any copyhold or customary land, parcel of the manor, so as in every such case to effect an enfranchisement."

Statutory-Copyhold Act, 1894.

(b) Under the Copyhold Act, 1894 (*q*), enfranchisement may be either (1) compulsory, at the instance of either the lord or the tenant, by means of an award of the Board of Agriculture (*r*), or (2) voluntary, by agreement between the lord and the tenant, with the consent of the Board of Agriculture, followed by a deed

(*k*) *Wakeford's Case*, 1 Leon. 102.

(*l*) 1 Watk. Cop., Ch. X., 362; *Bradshaw* v. *Lawson*, 4 T. R. 443.

(*m*) 57 & 58 Vict. c. 46, a consolidating statute which repealed and re-enacted the bulk of the former Copyhold Acts of 1841, 1843, 1844, 1852, 1858, and 1887 (4 & 5 Vict. c. 35; 6 & 7 Vict. c. 23; 7 & 8 Vict. c. 55; 15 & 16 Vict. c. 51; 21 & 22 Vict. c. 94; and 50 & 51 Vict. c. 73). These Acts contained also certain provisions for the commutation of rents, fines, and heriots, and of the lord's rights in timber and minerals, without a complete enfranchisement, the copyhold tenure not being destroyed. This method of partial enfranchisement was, however, found to be practically a dead letter, and the provisions in question were not re-enacted by the Copyhold Act, 1894.

(*n*) 1 Watk. Cop. 362, 363.

(*o*) See form of power in 2 K. & E. 598; and of a deed of enfranchisement under such a power, in Dav. Conc. Prec. 152.

(*p*) 45 & 46 Vict. c. 38, ss. 3 (ii.), 4 (1) and (7), 5, 18, 20 (1). See form of enfranchisement in 1 K. & E. 518.

(*q*) 57 & 58 Vict. c. 46.

(*r*) *Ib.*, Part I., ss. 1—13.

of conveyance, which is effectual to convey the freehold in fee simple, whatever be the respective estates or interests of the lord and the tenant (*s*).

Compulsory.

(1) Compulsory enfranchisement. Where there is an admitted tenant (*t*), either the lord or the tenant may require and compel enfranchisement. The compensation to the lord may be determined (s. 5) by agreement in writing between the lord and tenant; or by the Board of Agriculture (if the lord and tenant so agree); or by valuers appointed by the lord and tenant; and, in some cases, by a valuer to be appointed by the justices. In certain cases (s. 8) the compensation is (unless the parties otherwise agree) to be an annual rent-charge, issuing out of the enfranchised land; in all other cases it is to be a gross sum to be paid before completion. To effectuate the enfranchisement, the Board of Agriculture (s. 10) make and confirm an award, which is to be entered on the Court Rolls. There are certain restrictions on the right to compel enfranchisement, where it might work hardship or injustice (*u*). The expenses of a compulsory enfranchisement are to be borne by the person who requires the enfranchisement (*x*).

Voluntary.

(2) Voluntary enfranchisement may be effected with the consent of the Board of Agriculture (s. 14), subject, where either the manor or the copyhold is settled, to the giving of certain notices to remaindermen or reversioners. The consideration (s. 15) may be either (1) a gross sum, or (2) a rent-charge on the enfranchised land, or (3) a conveyance of land or a right to minerals, or (4) a conveyance of "a right to waste in lands belonging to the manor;" or it may be provided partly in one way and partly in another. The enfranchisement may (s. 16) be effected by deed, with the consent of the Board of Agriculture.

Effect of enfranchisement.

The effect of an enfranchisement (whether compulsory or voluntary) under the Act is (s. 21) that the land becomes of freehold tenure; but the lord's right to escheat, for want of heirs, is preserved (*y*); the land enfranchised ceases to be subject to

(*s*) 57 & 58 Vict. c. 46, Part II., ss. 14—20.

(*t*) By s. 94 of the Act, "tenant" includes a surrenderee by way of mortgage when in possession; but (s. 1) a mortgagee who is not in possession cannot compel enfranchisement.

(*u*) Copyhold Act, 1894, ss. 11—13.

(*x*) *Ib.* s. 34.

(*y*) Properly an escheat is an incident of tenure. It may, however, perhaps be considered that the effect of this provision as to escheat is not to preserve the tenure, but only to create a peculiar statutory

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any customary mode of descent, or to any other custom, and becomes subject to the same laws relating to descents and dower and curtesy as are applicable to lands held in free and common socage; it is not to be subject to any incumbrance affecting the manor; rights of common (s. 22) are preserved; and (s. 23) the rights of the lord or the tenant in or to mines, minerals, franchises, sporting, &c., are not to be affected without the express consent in writing of the lord or tenant respectively. The Act contains provisions (ss. 25 to 33) as to the payment and application of any gross sum, and as to the payment, application, recovery, and redemption of rent-charges created under the Act; and (ss. 34 and 35) as to the expenses; and (ss. 36 and 37) for charging the consideration money and the tenant's expenses on the enfranchised land, and the expenses of the lord on the manor, by certificate (s. 41) under the seal of the Board of Agriculture. It is not necessary for the present purpose to discuss the administrative provisions contained in Part V. of the Act, or the application of the Act to special manors as provided by Part VI. of the Act; but it may be noted that (s. 42) on the admittance of any tenant the steward of the manor is bound to give him notice of his right to obtain enfranchisement.

Customary Court.

The Act (s. 82) provides that a customary Court may be held, although there is no copyhold tenant of the manor, or although there is no copyhold tenant present at the Court; but a proclamation made at such a Court is not to affect the right of any person not present at the Court, unless notice of it is served on him within a month; that (s. 83) grants of copyholds may be made out of the manor, and without holding a Court; and (s. 84) that admittances may be made out of the manor, and without holding a Court, and without a presentment by the homage of the surrender, instrument, or fact, in pursuance of which the admittance is made; and that a person may be admitted by attorney.

Grants.

Admittances.

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right of escheat; for otherwise the Act would *pro tanto* override the Statute of *Quia Emptores*, since which the grantee of a freehold in fee simple cannot hold of the grantor.

CHAPTER XIII.

INCORPOREAL HEREDITAMENTS.

We have already explained the distinction between corporeal and incorporeal hereditaments (*a*). It will be remembered that incorporeal hereditaments resemble corporeal hereditaments in that they pass on the death of the owner, in the absence of disposition by will, to the heir, while they differ from corporeal hereditaments in that they do not lie in livery (*b*).

Principal kinds.

The principal incorporeal hereditaments are—I. Hereditary offices and dignities, which we shall not discuss (*c*); II. Personal annuities limited to the heirs (*d*); III. Reversions and Remainders (*e*); IV. Profits *à prendre;* V. Easements (*f*); VI. Advowsons; VII. Tithes; VIII. Franchises; IX. Rents (*g*).

Where the right to the enjoyment of one hereditament is annexed to the enjoyment of another, the former is said to be "appendant" or "appurtenant" to the latter.

Incorporeal hereditaments may be (1) appendant to corporeal hereditaments; (2) appurtenant to corporeal hereditaments; (3) in gross, *i.e.*, existing as separate subjects of property (*h*). In order to understand the distinction between appendant

(*a*) *Ante*, p. 12; Challis, R. P., p. 47; 2 Bl. 20.

(*b*) Therefore they are said to "lie in grant and not in livery" (of seisin); see *ante*, p. 13, note (*q*). A freehold interest in them cannot be created except by deed. But "an agreement for valuable consideration, though not under seal, is sufficient to create a right to an easement, and, for the purpose of creating a lawful user, is as good as a deed;" *per* Lindley, J., *Dalton* v. *Angus*, 6 App. Cas., at p. 765; *ib.* p. 782, *per* Bowen, J., as to these "equitable rights in the nature of easements," and Gale on Easements, 58.

(*c*) See Co. Litt. 16 a, 16 b; Cruise, Dig., vol. iii., tit. xxv., xxvi.; Cruise on Dignities; Challis, R. P. 45. A hereditary title of honour is "land" within the Settled Land Act, 1882, s. 2 (10) (i.). See *Re Rivett-Carnac's Will*, 30 Ch. Div. 136, considered in *Re Aylesford's Settled Estates*, 32 Ch. Div. 162.

(*d*) See *ante*, p. 12.

(*e*) Reversions and remainders are discussed, *ante*, p. 228, *et seq.* It will be noticed that they differ from other incorporeal hereditaments in that they are *estates* in the land.

(*f*) As to whether easements are hereditaments, see *ante*, p. 13, in note (*q*).

(*g*) See another classification, 2 Bl. 21.

(*h*) See Wms. R. P., p. 400.

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and appurtenant it is necessary to consider the meaning of "prescription."

Prescription—

At Common law the right to the enjoyment of an incorporeal hereditament, as appendant or appurtenant (*i*) to a corporeal hereditament, may be established by prescription (*k*), that is, by proof that the right has been immemorially enjoyed by the owner of the corporeal hereditament and persons through whom he derives title to the corporeal hereditament. The supposition is that a grant was made to his predecessor in title before the commencement of legal memory (*l*), and that the grant has been lost (*m*). Owing to the difficulty of carrying back the proof during so long a period, the Courts adopted the rule that the uninterrupted enjoyment of an incorporeal hereditament for the period of forty, or even twenty years (*n*) according to the circumstances, raised a presumption that it had been enjoyed continuously since a time before the commencement of legal memory. This presumption can be rebutted by shewing that the right had its origin since that time (*o*). To meet cases in which a presumption of immemorial user was liable to be rebutted by proof that the usage arose since the beginning of the reign of Richard I., it became the practice to allege that a grant had been made at a time within the period of legal memory, and that such grant had been lost (*o*). In support of such an allegation it was necessary to give some evidence to show that the usage probably arose about the time at which the

—supposes grant before legal memory.

Lost grant within legal memory.

(*i*) There are a few cases in which an incorporeal hereditament in gross can be prescribed for by an individual; (*e.g.*, common in gross; Co. Litt. 122 a; sole and several pasture; *Welcome* v. *Upton*, 6 M. & W. 536); or by a corporation, see *Johnson* v. *Barnes*, L. R. 7 C. P. 592; 8 C. P. 527; *Rex* v. *Churchill*, 4 B. & C. 750. See these and some other cases discussed in Herbert on Prescription, 59, *et seq.* As to prescribing for franchises, see Co. Litt. 114 a, b.

(*k*) See 3 Cruise, Dig. 420; Shelford, R. P. Stat., pp. 26, *et seq.*; Williams on Commons, Lect. i.; Herbert on Prescription; Gale on Easements, Ch. IV. The reader is referred especially to the elaborate discussion of the Law of Prescription in the case of *Angus* v. *Dalton*, 3 Q. B. D. 85 (see pp. 90, 103—104); S. C. 4 Q. B. D. 162; sub nom. *Dalton* v. *Angus*, 6 App. Cas. 740 (see *per* Lord Blackburn, at p. 818).

(*l*) The first day of the reign of Richard I. (3rd Sept., 1189); a time apparently adopted by analogy to the period of limitation in a writ of right for the recovery of land laid down by the Statute of Westminster the First (3 Edwd. I., c. 39). See Co. Litt. 113.

(*m*) See Stephen, Dig. Evid., p. 113, Art. 100.

(*n*) By analogy to the Limitation Act, 1623 (21 Jas. I., c. 16), which limited the time for bringing a possessory action to twenty years.

(*o*) *Angus* v. *Dalton*, 3 Q. B. D., at p. 105; 4 Q. B. D., at p. 172; *Bass* v. *Gregory*, 25 Q. B. D. 481, 484.

grant was alleged to have been made (*p*). The allegation of a lost grant might, however, be defeated by showing that no such grant could have been lawfully made (*q*), or that the enjoyment was by sufferance (*r*).

In this state of things, the Prescription Act, 1832 (*s*), was passed (*t*). The preamble to the Act is as follows:— Prescription Act, 2 & 3 Will. IV. c. 71.

> "Whereas the expression 'time immemorial, or time whereof the memory of man runneth not to the contrary,' is now by the law of England in many cases considered to include and denote the whole period of time from the reign of King Richard the First, whereby the title to matters that have been long enjoyed is sometimes defeated by showing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice; for remedy thereof be it enacted, &c."

The main provisions of the Act may be thus summarized (*u*):—

S. 1. Claims to rights of common or other profits or benefits from or upon any land (except tithes, rent, and services) are not to be defeated after thirty years' uninterrupted enjoyment by shewing that such right was first enjoyed at any time prior to such period of thirty years; but such claim may be defeated in any other way by which it is now liable to be defeated; and when such right has been enjoyed as aforesaid for sixty years, it shall be indefeasible, unless had by consent or agreement. Profits *à prendre*.

S. 2. A similar provision as to rights of way or water, or other easement, except that the periods are twenty and forty years respectively (*x*). Easements.

S. 3. Right to light is to be indefeasible after enjoyment, without interruption (*y*), for twenty years unless it has been enjoyed by consent in writing (*z*). Light.

(*p*) *Blewett* v. *Tregonning*, 3 A. & E. 554; but juries were directed to find a lost grant in cases in which no one had the faintest belief that any grant had ever existed, and where the presumption was known to be a mere fiction.

(*q*) *Mill* v. *Commissioner of New Forest*, 18 C. B. 60; *Angus* v. *Dalton*, 4 Q. B. D., at pp. 174, 175, *per* Thesiger, L.J.; *ib.* 186, *per* Cotton, L.J.

(*r*) See *Angus* v. *Dalton*, 3 Q. B. D. 85, 93.

(*s*) 2 & 3 Will. IV. c. 71. The Act relates (s. 1) to claims which may be lawfully made at the Common law by custom, prescription, or grant," to "any right of common or other profit, or benefit," and (s. 2) to "any way or other easement, or to any watercourse, or the use of any water." See the Act, with notes, in Shelford, R. P. Stat., pp. 1, *et seq.*

(*t*) It applies only to rights which are in some way appurtenant to a dominant tenement, not to rights claimed in gross; *Shuttleworth* v. *Le Fleming*, 19 C. B. (N. S.) 687; see *Warwick* v. *Caius College*, 5 T. L. R. 461; 6 *ib.* 447.

(*u*) See Marcy's Conveyancing Statutes.

(*x*) This section does not apply to light; *Perry* v. *Eames*, [1891] 1 Ch. 658; *Wheaton* v. *Maple & Co.* [1893] 3 Ch. 48.

(*y*) As to the meaning of these words, and that they are not equivalent to "without cessation," see *Hollins* v. *Verney*, 13 Q. B. D. 304, at p. 307.

(*z*) This section does not bind the Crown; *Perry* v. *Eames* and *Wheaton* v. *Maple & Co.*, *ubi sup.*

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S. 4. The said periods are to be deemed those next before suit or action commenced questioning the right. No act to be deemed an "interruption" unless acquiesced in for one year after notice (*a*).

Disabilities.

The time during which any person otherwise capable of resisting any claim to any of the matters above mentioned shall have been or shall be under any disability (*e.g.*, infancy or lunacy), or a tenant for life, is to be excluded in the computation of the periods above mentioned, except only where the right or claim is by the Act declared to be absolute and indefeasible (*b*).

It appears to be necessary to prove enjoyment within a year before action brought in order to satisfy the 4th section of the statute (*c*); and inability to do this sometimes renders it necessary to rely upon prescription at Common law or upon the presumption of a lost grant. It should be added, that it is provided in the 6th section of the Act as follows:—

Application of Act.

> S. 6. "In the several cases mentioned in and provided for by this Act, no presumption shall be allowed or made in favour or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this Act as may be applicable to the case and to the nature of the claim."

The meaning of this section seems to be "that no presumption or inference in support of the claim shall be derived from the bare fact of user or enjoyment for less than the prescribed number of years; but, when there are other circumstances in addition, the statute does not take away from the fact of enjoyment for a shorter period its natural weight as evidence, so as to preclude a jury from taking it, along with other circumstances, into

(*a*) See *Bewley* v. *Atkinson*, 13 Ch. Div. 283; *Hollins* v. *Verney*, 13 Q. B. D. 304. But an inchoate title under the Act will not be treated as complete even if effectual interruption before the title becomes absolute is impossible; *Lord Battersea* v. *Commissioners of Sewers*, [1895] 2 Ch. 708.

(*b*) S. 7. Therefore, after sixty or forty years' user, as the case may be, the right may be established though there has been a succession of life tenancies during the whole period; *Warburton* v. *Parke*, 2 H. & N. 64; *Wright* v. *Williams*, 1 M. & W. 77; but, as to easements, s. 8 of the Act further provides that where the tenement over which the right is claimed has been held by a tenant for life or for a lease exceeding three years, the period of the tenancy for life or years is to be excluded in the computation of the period of forty years referred to in s. 2. But (s. 8) the reversioner must resist the claim within three years after the determination of the tenancy for life or years. Probably the word "reversion" in s. 8 does not apply to a remainderman; see *Symons* v. *Leaker*, 15 Q. B. D. 629; *Laird* v. *Briggs*, 16 Ch. Div. 440; 19 Ch. Div. 22.

(*c*) *Parker* v. *Mitchell*, 11 A. & E. 788.

consideration as evidence of a grant" (*d*). The owner of the dominant tenement may still prove his right over the servient tenement as before; where the statute is not needed, the title can be rested on the original right before the passing of the statute (*e*).

Effect of Act.

The statute has not altered the nature of the right, or the principle upon which it is to be determined whether the right has been infringed; but has merely substituted a statutory title for the fiction of a lost grant (*f*). Thus, as regards the right to light and air, it was contended in *Kelk* v. *Pearson* (*g*) that enjoyment of free light and air for more than twenty years, gave under the statute an absolute and indefeasible right to the whole amount which came through the windows into the house. James, L.J., said:—

"I am of opinion that the statute has in no degree whatever altered the pre-existing law as to the nature and extent of this right. The nature and extent of the right before that statute was to have that amount of light through the windows of a house which was sufficient, according to the ordinary notions of mankind, for the comfortable use and enjoyment of that house as a dwelling-house, if it were a dwelling-house, or for the beneficial use and occupation of the house, if it were a warehouse, a shop, or other place of business. That was the extent of the easement—a right to prevent your neighbour from building upon his land so as to obstruct the access of sufficient light and air to such an extent as to render the house substantially less comfortable and enjoyable.

"Since the statute, as before the statute, it resolves itself simply into the same question, a question of degree."

"Appendant" —"Appurtenant."

It is not every hereditament that can be made appendant or appurtenant to another. Coke says (*h*):—

"Prescription does not make a thing appendant or appurtenant, unless the thing which shall be appendant or appurtenant agrees in quality or nature to the thing to which it shall be appendant or appurtenant; as a thing corporeal cannot be appendant to a thing corporeal, nor a thing incorporeal to a thing incorporeal (*i*). But a thing incorporeal, which lies

(*d*) *Per* Westbury, C., in *Hanmer* v. *Chance*, 34 L. J. Ch. 413.

(*e*) *Per* Hatherley, C., in *Warrick* v. *Queen's College*, L. R. 6 Ch. 728.

(*f*) *Per* Lord Selborne, *City of London Brewery Co.* v. *Tennant*, L. R. 9 Ch. 219.

(*g*) L. R. 6 Ch. 809. The amount of obstruction is a question of fact in each case; *Parker* v. *First Avenue Hotel Co.*, 24 Ch. Div. 282.

(*h*) Co. Litt. 121 b. As to prescribing for a pew as appurtenant to a house, see *Stileman—Gibbard* v. *Wilkinson* [1897], 1 Q. B. 749.

(*i*) But the word "appurtenant" is sometimes used in the secondary sense of "usually enjoyed with." In this sense one corporeal hereditament may be appurtenant to another; Elph. N. & C. Interp. 188.

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in grant as an advowson, may be appendant to a thing corporeal, as to a manor, or a thing corporate, as land, to a thing incorporate, as an office; but they must agree in nature and quality, for a common of turbary or estovers cannot be appendant or appurtenant to land, but to a house, to be spent there. So, a leet (*k*) which is temporal cannot be appendant to a church or chapel, which is ecclesiastical."

"Appendant" and "appurtenant" are often, particularly in the older reports, confounded (*l*). The distinction appears to be that one hereditament is appendant to another where it became annexed in enjoyment to it by operation of law before the time of the commencement of legal memory. On the other hand, a thing may become appurtenant by express grant, even at the present day.

From the nature of appendancy it is obvious that it is not every incorporeal hereditament that can be appendant. Probably the only incorporeal hereditaments that can be appendant are commons and advowsons (*m*).

Prescription in a *que estate*.

Where a right is claimed as appendant or appurtenant to lands, the person claiming it alleges that he and all those whose estate he has (*que estate il ad*) in the lands have enjoyed it. This is called "prescribing in a *que estate*" (*n*).

—in a man and his ancestors.

Where the right is not claimed as appendant or appurtenant to lands, the allegation is that the person claiming and his ancestors have enjoyed it; and such a right is said to be "in gross" (*o*).

Claim by custom.

The right to an incorporeal hereditament may in some cases be claimed by custom, *i.e.*, under the law which has prevailed from time immemorial in a particular place (*p*).

Prescription and custom distinguished.

The distinction between prescription and custom is thus stated by Coke: "Prescription, which is personal, is for the most part applied to persons, being made in the name of a certain person and of his ancestors, or of those whose estate he hath; or in bodies politic or corporate, and their predecessors; but a custom, which is local, is alleged in no person, but laid within some manor

(*k*) *I.e.*, the right to hold a Court leet, as to which see Elph. N. & C. Interp. 592.

(*l*) The passage from Co. Litt. just cited will be found in *Tyrringham's Case*, 4 Rep. 36 b, with the omission of the word "appurtenant" all through.

(*m*) It is sometimes said that the seignory of the freehold lands held of a manor is appendant to the manor; but it appears to be more correct to say that it is parcel of the manor.

(*n*) Williams on Commons, Lect. ii., p. 16.

(*o*) 2 Bl. 265; Williams on Commons, 9.

(*p*) But, except in the case of copyholds, *ante*, p. 333, a profit *à prendre* cannot be claimed by custom; see Wms. on Commons, 194.

or other place" (*q*). Prescription can only be of something which could have a lawful origin at Common law, as distinguished from local custom (*r*).

Profits *à prendre*, easements, and licences must be distinguished.

Profits *à prendre*, easements, and licences distinguished.

A profit *à prendre* is a right which may be either appendant or appurtenant to a corporeal hereditament, or held in gross, to go on the land of another person and to take some profit from it, as to destroy game and keep it (*s*), to pasture cattle, or to dig and carry away minerals, or to take fish in the waters of another.

Easements.

An easement has been defined (*t*) to be a privilege without profit, which the owner of one tenement, which is called the "dominant" tenement, has over another, which is called the "servient" tenement, to compel the owner thereof to permit to be done, or to refrain from doing, something on such tenement for the advantage of the former (*u*). Thus, if the owner of estate A. has a right of way over estate B., he can compel the owner of estate B. to permit him to go along the way. So, if the owner of estate A. has ancient windows in a house on his estate, overlooking estate B., he can prevent the owner of estate B. from doing any act on estate B. which will obstruct the accustomed access of light and air to those windows (*x*).

The former kind of easement is termed Affirmative; the latter, Negative.

Licence.

On the other hand, a licence is a mere personal liberty granted to a man to do something on the land of another (*y*). A mere licence is in its nature revocable at the pleasure of the licensor; but, if it comprises or is connected with a grant (*z*), the party

(*q*) Co. Litt. 113 b, quoted in notes to *Tyrringham's Case*, Tudor, L. C. R. P. 137; Elph. Introd. 94; Leake, Us. & Prof. 551.

(*r*) *Per* Lord Blackburn, *Goodman* v. *Mayor of Saltash*, 7 App. Cas., at p. 654.

(*s*) *Hooper* v. *Clark*, L. R. 2 Q. B. 200; *Webber* v. *Lee*, 9 Q. B. D. 315.

(*t*) Termes de la Ley, s.v. "Easement," cited 5 B. & C. 229, *per* Bayley, J., as "a book of great antiquity and accuracy." Notes to *Sury* v. *Pigot*, Tudor, L. C. R. P. 167; Elph. Introd. 92; Elph. N. & C. Interp. 184, *et seq.* See the nature of an easement discussed in *Metropolitan Rly. Co.* v. *Fowler*, [1892] 1 Q. B. 165.

(*u*) As to the effect of the grant of an easement to a person who subsequently acquires an interest in the dominant tenement larger than he had at the time of the grant, see *Rymer* v. *McIlroy*, [1897] 1 Ch. 528.

(*x*) As to an easement in respect of the access of air, see *Aldin* v. *Latimer Clark, Muirhead & Co.*, [1894] 2 Ch. 437; *Chastey* v. *Ackland*, [1895] 2 Ch. 389; [1897] A. C. 155.

(*y*) *E.g.*, to put pleasure-boats on a canal; *Hill* v. *Tupper*, 2 H. & C. 121.

(*z*) *I.e.*, at Common Law a *valid* grant by deed; *per* Kay, J., *McManus* v. *Cooke*, 35 Ch. Div., at p. 689, but see *ib.* pp. 695, 696, as to the effect in Equity when there is no grant by deed.

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who has given it cannot in general revoke it so as to defeat his grant to which it was incident (*a*). A licence differs from an easement inasmuch as it is not annexed in enjoyment to land. A mere licence differs from a profit *à prendre* inasmuch as it does not enable the licensee to take any profit; and a licence differs from both easements and profits *à prendre* as it is not a hereditament. The distinction between a licence and a profit *à prendre* is discussed in *Wickham* v. *Hawker* (*b*). The word "licence" is sometimes used to denote a profit *à prendre*, and in this case it is sometimes called a "licence of profit;" for example, a mining lease effected by a grant of liberty to take the minerals, without any demise of the land (*c*).

Creation—By deed.

Where an easement or profit *à prendre* is created by express grant, a deed (but no special form of words (*d*)) is necessary; but no deed is necessary to create a licence (*e*); and an equitable right to an easement or profit *à prendre* may be created for value without deed (*f*).

—Under Statute of Uses.

We have seen that by the Statute of Uses real estate (except copyholds), whether corporeal or incorporeal, may be conveyed to uses. It is however said (*g*), that the property must be *in esse* at the time of the creation of the use. Therefore, if A. covenant to stand seised of lands, which he shall afterwards purchase, to certain uses, no use can arise by virtue of such covenant upon lands of which he may afterwards become the purchaser. So, if A. convey his lands by bargain and sale enrolled to J. S. in fee, with a way over other lands belonging to A., the right of way does not pass; because it is not *in esse* at the time of the bargain and sale, in other words because there is no previously existing seisin of the right of way out of which the use can arise. On the other hand, if it was an existing right of way (over the land of a stranger) appurtenant to the lands

(*a*) *Per* Alderson, B., *Wood* v. *Leadbitter*, 13 M. & W. 838.

(*b*) 7 M. & W. 78; *Webber* v. *Lee*, 9 Q. B. D. 315.

(*c*) See *Duke of Sutherland* v. *Heathcote*, [1892] 1 Ch. 475, 483.

(*d*) Elph. N. & C. Interp. 184.

(*e*) *Hewlins* v. *Shippam*, 5 B. & C. 221; *Cocker* v. *Cowper*, 1 C. M. & R. 418; *Rex* v. *Horndon on the Hill*, 4 M. & S. 562; *Wood* v. *Leadbitter*, 13 M. & W. 838; *Adams* v. *Andrews*, 15 Q. B. 284.

(*f*) *Devonshire* v. *Eglin*, 14 Beav. 530; *Dalton* v. *Angus*, 6 App. Cas., at p. 765; *ib.* p. 782; *ante*, p. 337, note (*b*); *McManus* v. *Cooke*, 35 Ch. Div. 681, at pp. 693, 694; *per* Lindley, L.J., in *Wheaton* v. *Maple & Co.*, [1893] 3 Ch., at p. 65.

(*g*) Sanders on Uses, vol. i., p. 105.

bargained and sold, it would pass together with the lands (*h*). And so it is said (*i*):—

"Neither can things which are mere rights be conveyed by way of use, as commons, &c., ways in gross, for a man cannot walk over ground to the use of a third person."

Further, the Statute of Uses (*k*) speaks of the seisin which is to be acquired by *cestui que use* by virtue of the statute as being seisin "of and in such like *estates*" (*l*), so that estates only could be raised by way of use, and the statute did not apply to the creation of other new interests (*m*), though, when once created for a freehold interest, they could, as hereditaments, be conveyed to uses (*n*). This inconvenience, which arose under conveyances to uses and under powers of sale and exchange, has been removed for the future by the Conveyancing and Law of Property Act, 1881 (*o*), which, in reference to conveyances made after 1881, enacts that "a conveyance of freehold land to the use that any person may have, for an estate or interest not exceeding in duration the estate conveyed in the land, any easement, right, liberty, or privilege, in, or over, or with respect to that land, or any part thereof, shall operate to vest in possession in that person that easement," &c., "for the estate or interest expressed to be limited to him."

—Under Conveyancing Act, 1881.

Profits *à prendre* and easements may be extinguished by express release, or by unity of seisin or ownership of the dominant and servient tenements (*p*), or by abandonment. But there cannot be abandonment of an easement without a release by deed, or evidence from which a jury can presume a release (*q*). In order to establish abandonment, it is not necessary to show any definite period of non-user: the period of time is only material as one element from which the grantee's intention to release or abandon his easement may be inferred against him; what period may be sufficient in any particular case must depend on all the

Extinguishment—

Abandonment.

(*h*) Elph. N. & C. Interp. 186.
(*i*) In Bac. Abr., tit. Uses (F).
(*k*) 27 Hen. VIII. c. 10, s. 1.
(*l*) See *ante*, p. 277.
(*m*) Except rent-charges, provided for by s. 5.
(*n*) *Dayrell* v. *Hoare*, 12 Ad. & El. 356; *Beaudeley* v. *Brook*, Cro. Jac. 189.
(*o*) 44 & 45 Vict. c. 41, s. 62.
(*p*) As to the re-creation of rights thus extinguished or suspended, see *James* v. *Plant*, 4 Ad. & El. 749; and *Kay* v. *Oxley*, L. R. 10 Q. B. 360.
(*q*) *Per* Willes, J., *Lovell* v. *Smith*, 3 C. B. (N. S.) 127; and see *per* Chitty, J., *Mouson & Co.* v. *Boehm*, 26 Ch. Div., at p. 405.

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accompanying circumstances. It is not so much the duration of the cesser as the nature of the act done by the grantee of the easement, or of the adverse act acquiesced in by him, and the intention in him which either the one or the other indicates, which are material (*r*).

Easements passing on conveyance.

Easements and profits *à prendre* which are appendant or appurtenant to the land in respect of which they are exercised, pass by a conveyance of the land simply (*s*); but if such rights, though reputed to belong to or usually enjoyed with the lands, were not strictly appendant or appurtenant to them, they did not in conveyances, before 1882, pass by the conveyance of the land, though expressed to be with the appurtenances. In order that they might pass, there must have been an express or a general description of them, and hence the insertion of what are called "general words" (*t*) after the parcels in a conveyance, so as to include reputed rights and easements (*u*).

"General Words."

Under Conveyancing Act, 1881.

In conveyances made after 1881, by virtue of the Conveyancing and Law of Property Act, 1881 (*x*), if and as far as a contrary intention is not expressed in the conveyance, "general words" are implied in the conveyance operating to pass all "liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain" to the property conveyed, "or *at the time of conveyance* demised, occupied or enjoyed with, or reputed or known as part or parcel of, or appurtenant to," the

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(*r*) *Per* Lord Denman, C.J., in *Queen* v. *Chorley*, 12 Q. B. 519; and see *per* Lord Chelmsford, L.C., in *Crossley* v. *Lightowler*, L. R. 2 Ch. 482. See further, on extinguishment, the notes to *Tyrringham's Case* and to *Sury* v. *Pigot*, in Tudor, L. C. R. P. See, however, *per* Lord Selborne, in *Neill* v. *Duke of Devonshire*, 8 App. Cas. 135, at p. 154, that "abandonment is a term which has no legal meaning as to an incorporeal hereditament which can only pass by deed." And in all the cases which are sometimes referred to as deciding that such a right can be abandoned (see *e.g.*, Hall on *Profits à Prendre*, 339), there seems to have been an actual exclusion of or adverse enjoyment against the person entitled to the right and not a mere non-user by him.

(*s*) 1 Dav. Prec. 91; Elph. N. & C. Interp. 186.

(*t*) Elph. Introd. 92. Stud. Prec. 2 note (*d*), 129.

(*u*) Forms will be found in the books, specially adapted to different kinds of property. An instance of the effect of these words is to be found in *Kay* v. *Oxley*, L. R. 10 Q. B. 360; and see *Bayley* v. *Great Western Rly. Co.*, 26 Ch. Div. 434. As to what will pass by the several technical words of description, see 1 Dav. Prec. 88, *et seq.*; and 2 Dav. Prec. ii. 768.

(*x*) 44 & 45 Vict. c. 41, s. 6. This section does not enlarge the meaning of the word "appurtenances" in a *contract* for the sale of land "with the appurtenances;" *Re Peck and School Board for London*, [1893] 2 Ch. 315.

property conveyed. The Act gives a general description of the rights to be included by implication in a conveyance—(1) of land; (2) of land having houses or other buildings thereon; and (3) of a manor.

Right of support to land.

An easement must not be confounded with the ordinary rights of enjoyment by a man of his own property; for instance, the owner of land in its natural state has, as incident to his property in the land, a right to support from the neighbouring land. This right is not an easement (*y*).

—to buildings.

On the other hand, a man who erects a building at the extremity of his land, so as to cause a greater lateral thrust against his neighbour's land, will, after twenty years' uninterrupted enjoyment, gain a right to support for the building, and this right is an easement (*z*).

Common, rights of.

A very important instance of a profit *à prendre* is a right of Common (*a*) which may be defined as a right which one person has of taking some part of the produce of land, while the ownership of the soil itself is vested in another (*b*). The produce of the land (or some species of it) is thus enjoyed in common with the owner of the soil, and generally in common with other persons also. The lord of the manor, or other owner of the soil of a waste, is sometimes spoken of as the "chief commoner," but he takes the produce by virtue of his ownership of the soil (*c*), while the commoners, properly so-called, take their shares of it as being entitled to a mere profit *à prendre*. The four principal rights of Common are:—I. Common of Pasture (*d*), or the right of feeding beasts upon the land of another; II. Common of Piscary (*e*), or the right of fishing in the waters of another; III. Common of Estovers (*f*), or the right of cutting wood, gorse, or furze and such like, on the land of another; IV. Common of Turbary (*g*), or the right of digging turves on the soil of another; to which, perhaps, may be added the similar right of getting sand, clay, stone, and even coals and other minerals on another's land (*h*).

(*y*) *Backhouse* v. *Bonomi*, 9 H. L. C. 503; *Rigby* v. *Bennett*, 21 Ch. Div. 559.

(*z*) *Dalton* v. *Angus*, 6 App. Cas. 470; *Lemaitre* v. *Davis*, 19 Ch. Div. 281; *Tone* v. *Preston*, 24 Ch. Div. 739.

(*a*) Tudor, L. C. R. P., p. 127, notes to *Tyrringham's Case*.

(*b*) Burton, Comp. (1132); Co. Litt. 122 a.

(*c*) See *Musgrave* v. *Inclosure Commissioners*, L. R. 9 Q. B. 162; *Baring* v. *Abingdon*, [1892] 2 Ch. 374; Williams on Commons, 150.

(*d*) Elph. N. & C. Interp. 607.

(*e*) *Ib.* 576.

(*f*) Williams on Commons, 186.

(*g*) Elph. N. & C. Interp. 627.

(*h*) That these are rights of common, see Co. Litt. 122 b. See instances in

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Common of pasture (*i*) may be appendant, appurtenant, or in gross.

Common appendant.

The origin of "common appendant" by the ancient law is explained in *Tyrringham's Case* (*k*) as follows:—

"When a lord enfeoffed another of arable land, to hold of him in socage, *i.e.*, *per servicium socæ* as every such tenure at the beginning (as Littleton saith) was, that the feoffee *ad manutenendum servicium socæ*, should have common in the lord's wastes for his necessary cattle which ploughed and manured his land, and that for two reasons:—1st. Because it was, as it was then held, *tacitè* implied in the feoffment; for the feoffee could not plough and manure his land without cattle, and they could not be kept without pasture, *et per consequens* the feoffee should have (as a thing necessary and incident) common in the lord's wastes and land, and that appears by the ancient books, and by the rehearsal of the Statute of Merton [20 Hen. III.], c. 4. The second reason was for the maintenance and advancement of tillage, which is much respected and favoured in law, so that such common appendant is of common right, and commences by operation of law, and in favour of tillage, and therefore it is not necessary to prescribe therein, as it would be if it was against common right; but it is only appendant to ancient land, arable, laic, and gain(?), and only for cattle, &c., horses and oxen to plough his land, and cows and sheep to manure his land, and all for the bettering and advancement of tillage, and therefore it is against the nature of a common appendant to be appendant to meadow or pasture."

Common appurtenant.

Common appurtenant does not, like common appendant, owe its origin to common right, or to a general privilege supposed to have been conferred by lords upon tenants to whom they granted arable lands; but it may commence at the present day, and may be claimed under an express grant from the owner of the land, or by prescription (*l*).

(*k*) [illegible] 76 a. See also [illegible]

[illegible] 76 a. See also Williams on Commons, Ch. V. Sect. I.

[illegible] 76 a. See also Williams on Commons, Ch. V. Sect. I.

[illegible] servitus quæsita antea de arrabile terra a tenure de fuy en socage, *id est*, per servicium socæ, come chescun tiel tenure al commencement come Littel' dit fuit, le profit *ad manutenendum servicium socæ* [illegible] comun en les wastes le Sir," &c. The reference seems to be to Littleton, s. 118, where it is said that "every tenure which is not tenure in chivalrie is tenure in socage."

"arrable land" anciently is called *lyde* [illegible] Co. Litt. 85 b. "*Ga gael*" signifies to till: Wms. R. P. Appendix [illegible].

(*l*) As to common appurtenant, see Williams on Commons, Lect. xii. p. [illegible]; Watkins on Commons, Ch. V.

Common in gross.

Common in gross (*n*) is claimed under a grant to a man and his heirs, or by prescription of enjoyment, unconnected with the ownership of land, by a man and his ancestors.

Common appendant can only be enjoyed in respect of land which, at the date when the common became appendant, was arable. It is restricted to commonable beasts, *i.e.*, horses, oxen, cows, and sheep; and is limited by levancy and couchancy (*o*). Common appurtenant or in gross is not subject to any of these restrictions.

Inhabitants, &c., cannot prescribe.

No right can be claimed by prescription to a profit *à prendre* on behalf of a shifting body, like the inhabitants of a town or residents of a particular district (*p*). The reason is that such a body cannot prescribe for a right in gross, for, not being a corporation, they are not capable of taking by a grant, and prescription presupposes a grant; nor can they prescribe in a *que estate*, for they have no permanent estate but are mere tenants at will (*q*); and the right is annexed to the fee simple estate only (*r*). An occupier, however, can exercise the right as claiming under the tenant in fee, and occupiers may properly be parties to an action brought to assert the right. A claim was made by "owners and occupiers" of lands within a forest, to common of pasture over the waste of the forest (*s*). It was urged that the claim could not be sustained on behalf of the occupiers, for it was to a profit *à prendre in alieno solo*, which cannot be vested in a body of occupiers by prescription or otherwise. James, L.J., after stating the rule of law as above, said:—

"Construing the allegations here according to their plain meaning, it appears to me that if they were judged most strictly, the allegation here is of a right of common in the owners and occupiers of lands in respect of those lands; for it is in express terms claimed as a right of common, either appendant or appurtenant, for their cattle, levant and couchant,

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(*n*) See Williams on Commons, 184; Hall on *Profits à Prendre*, 301; Woolrych on Commons, 65.

(*o*) Levancy and couchancy means the capability of the commonable tenement to maintain during the winter by its summer produce the cattle claimed to be depastured; see *Robertson* v. *Hartopp*, 43 Ch. Div. 484, at p. 516. Where the number of cattle is limited by levancy and couchancy, it is sometimes said to be "common *sans nombre*;" *i.e.*, as opposed to common for a fixed number of animals; see *Bennett* v. *Reeve*, Willes, 227.

(*p*) *Gateward's Case*, 6 Rep. 59 b (see on this case *Goodman* v. *Mayor of Saltash*, 7 App. Cas., at p. 660); *Grimstead* v. *Marlowe*, 4 T. R. 719; *Att.-Gen.* v. *Mathias*, 4 K. & J. 579.

(*q*) Elph. N. & C. Interp. 612, 613.

(*r*) Williams on Commons, 16.

(*s*) *Commissioners of Sewers* v. *Glasse*, L. R. 7 Ch. 465. See *Goodman* v. *Mayor of Saltash*, 7 App. Cas. 633.

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upon the tenements. That is an allegation of a right of common not unknown to the law—a right of common which is alleged as being appurtenant to land, and of course claimed by persons who are either owners or occupiers of the land in respect of which that easement (*t*) is claimed. It appears to me that the occupiers have a right to join, and to be joined, in any suit in this Court for that purpose. The occupier alone is entitled during the continuance of his occupancy; he may be an occupier for a long term of years, and he may be the only person substantially interested in the assertion of the right. Therefore, I cannot conceive that there is any objection to joining owners and occupiers in this way in their character of *quasi*-co-plaintiffs, and as persons on behalf of whom the right is alleged."

"Approvement."

Lords of Manors and other owners of waste lands subject to rights of common had certain powers of "approving," that is, inclosing and appropriating to themselves in severalty, parts of those lands so as to exclude the commoners, provided, generally speaking, that sufficient land was left for the enjoyment of the rights of common (*u*); and a title might be acquired by lapse of time under the Statutes of Limitation (*post*, Ch. XVI.) by persons who by mere encroachment, without title, took and kept possession of parts of the waste. Rights of common might also be affected in the cases above referred to (*ante*, p. 322) of grants of parts of the waste as copyhold.

Inclosure (*x*).

The rights of common might be completely extinguished by an agreement between the owner of the soil and the whole of the commoners, whereby the land was inclosed and divided between the parties in proportion to their respective rights, each commoner, generally speaking, being allotted a piece of land to hold in severalty in lieu of his right of common. Such agreements were in early times confirmed in some cases by decrees of the Court of Chancery: but about the time of Charles II. it became usual to carry out the inclosure by means of a private Act of Parliament, whereby commissioners were appointed who were to allot the land in severalty: and the Act generally enabled a majority of four-fifths, or some similar number, of the

(*t*) "Easement" is not properly used to describe a right of common, which is a profit *à prendre*.

(*u*) As to approvement under the Statutes of Merton (20 Hen. III. c. 4), and Westminster the Second (13 Edwd. I. c. 46); see Williams on Commons, Lect. viii., pp. 103, *et seq.*; Hunter on Open Spaces, Ch. II. No such inclosure or approvement is valid, if made since the Law of Commons Amendment Act, 1893 (56 & 57 Vict. c. 57), without the consent of the Board of Agriculture.

(*x*) See as to the history of Inclosures, Scrutton on Commons; Williams on Commons, Lect. xvii.; Woolrych on Commons, Ch. XXIV.

commoners to bind the whole body. These Acts became very numerous during the reign of George III., when the policy of inclosure was much favoured; but the expense and dilatoriness of the procedure were very great, and led to the passing of the Inclosure (Consolidation) Act, 1801 (*y*), which had the effect of shortening the provisions of the private Act required in each case and of lessening the expense. In 1845 inclosure was further facilitated by the Inclosure Act, 1845 (*z*). The scheme of this Act (which, subject to subsequent modifications, is still in force), was to establish a permanent body of Inclosure Commissioners, with power to frame Provisional Orders for inclosure, with the consent of the lord of the manor, where the land to be inclosed belonged to him as waste of, or otherwise in right of, his manor (*a*), and the consent of at least two-thirds in value of the commoners, and subject to confirmation of the Order by Act of Parliament. The powers and duties of the Inclosure Commissioners are now vested in the Board of Agriculture (*b*).

Commons Acts, 1866, 1876, &c.

But alarm having arisen by reason of the rapid inclosure of commons, and the effect thereof upon the health of the population, the Metropolitan Commons Acts, 1866 and 1869 (*c*), were passed to prevent the inclosure of commons within the Metropolitan Police District, and for the management and improvement of such commons, by some local authority or other body, or by Conservators elected for the purpose; and these were followed by the Commons Act, 1876 (*d*) which applies only to commons outside the Metropolitan Police District.

The main object of these Acts is to preserve commons as open spaces for the recreation and benefit of the inhabitants of the neighbourhood, and to keep order and prevent nuisances on the commons; but, speaking generally, the rights of commoners are not to be interfered with except in so far as they can be abridged or extinguished, which can only be done on compensation being made to the commoner. The procedure is by way of a scheme or Provisional Order, framed by the Board of Agriculture on the application of the persons empowered to apply under the Acts, and submitted to Parliament for confirmation by

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(*y*) 41 Geo. III. c. 109.
(*z*) 8 & 9 Vict. c. 118.
(*a*) *Ib.* ss. 27, 29.
(*b*) *Ante*, p. 54, note (*y*).
(*c*) 29 & 30 Vict. c. 122; 32 & 33 Vict. c. 107.
(*d*) 39 & 40 Vict. c. 56; amended by 41 & 42 Vict. c. 56; 42 & 43 Vict. c. 37.

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statute. The Metropolitan Commons Act, 1866, expressly forbids inclosure under the Inclosure Acts of any metropolitan common; the Commons Act, 1876, though it does not expressly forbid such inclosure in the case of other commons, recites in its preamble that "it is desirable that inclosure in severalty, as opposed to regulation of commons, should not be hereafter made unless it can be proved to the satisfaction of the [Board of Agriculture] and of Parliament that such inclosure will be of benefit to the neighbourhood as well as to private interests and to those who are legally interested in any such commons." Under this Act a manorial common cannot be either inclosed or regulated as an open space without the consent of the lord of the manor, as well as of persons representing at least two-thirds in value of such interests in the common as are affected by the proceedings (*i.e.*, generally, the commoners); but (s. 36) where an Act of Parliament has been passed confirming a Provisional Order under the Act for the regulation of a common, no part of such common can be inclosed without the sanction of Parliament (*e*).

Thus, rights of common, though probably very beneficial in the age and state of agriculture in which they originated, in later days were supposed to be injurious to agriculture, and accordingly the Legislature interfered to put an end to them by the separate inclosure of the lands subject to the rights. But now, on the other hand, the Legislature is checking the inclosures, for fear that, while private interests may be benefited by them, the health of the community may suffer, and it is only under very exceptional circumstances that inclosure of a common is now allowed to be effected under the Inclosure Acts.

Turbary.

Common of Turbary is the right to dig turves in the lord's waste or another man's land to burn as fuel in a house (*f*).

Piscary.

A right of fishing in the water of another is a species of profit *à prendre*. It may be either a "Common of Piscary," *i.e.*, a right to fish in common with the owner of the soil, or a several fishery (*g*).

(*e*) See, as to the Commons Acts and their effect and application, the very interesting and instructive work of Sir R. Hunter on the Preservation of Open Spaces, &c.; also Mr. Shaw Lefevre's work on "English Commons and Forests," giving the history of the movement for their preservation.

(*f*) Elph. N. & C. Interp. 627. It is not a right to cut green turf, but turf in the nature of peat, fit for fuel.

(*g*) See Williams on Commons, Lect. xviii.; and see as to the different kinds of fishery, Elph. N. & C. Interp. 576.

Easements.

Continuous.

Discontinuous.

Easements are divided into continuous and discontinuous. Easements of the former class are those which may be enjoyed without anything being done by the owner of the dominant tenement; as a right of drainage, or to the enjoyment of light and air. Easements of the latter class can only be enjoyed by the act of the owner of the dominant tenement; as a right of way, or the right to draw water (*h*).

Positive.

Negative.

Easements are also, as has already been said, divided into positive and negative. A positive easement is the right of the owner of the dominant tenement to do something on the servient tenement; a negative easement is the right of the owner of the dominant tenement to prevent the owner of the servient tenement from doing something on it.

Quasi-easements, where both tenements have the same owner.

A man cannot have an easement over his own land. For example, if the owner of two tenements, A. and B., drains A. by a sewer running under B., or habitually has access to A. by a road over B., the right of drainage, or of using the road, is not an easement over B.; it is merely the exercise by the owner of B. of one of his rights as such owner. Rights of this nature, which would be easements if the two tenements belonged to different owners, are sometimes called "*quasi*-easements," but more commonly, through an erroneous use of the word, "easements" simply.

Right of purchaser of one tenement.

Where the owner sells a tenement, in respect of which he exercises *quasi*-easements over another tenement belonging to him, the question whether those *quasi*-easements pass by the conveyance depends upon the intention expressed in it. But, in the absence of any expression of intention, the conveyance passes *quasi*-easements which are continuous and apparent, and necessary to the enjoyment of the tenement granted and have been used therewith before and up to the time of the conveyance (*i*).

By "apparent" *quasi*-easements are meant not only those which must necessarily be seen, but those which may be seen or known on careful inspection by a person ordinarily conversant with the subject. By "necessary" is meant necessary for the

(*h*) Lord Blackburn has traced the distinction between continuous and discontinuous easements to the authors of the *Code Napoléon*, and observes that it is not to be found in any English law authority before Gale on Easements in 1839; *Dalton* v. *Angus*, 6 App. Cas., at p. 821.

(*i*) Elph. N. & C. Interp. 189.

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comfortable enjoyment of the tenement as it existed before the severance.

Right of way over land retained by vendor.

Although a way is not a continuous easement, still a road generally used for the access to the tenement sold over a tenement retained by the vendor will pass by the conveyance of the former (*k*) if (1) it is over a specific and defined part of the tenement retained, as distinguished from the case where the owner of both tenements has passed over the tenement retained, but not in any defined track; and (2) the convenience of user does not cease upon the sale.

The general words inserted in conveyances of lands before 1882 (*l*) commonly included "ways usually enjoyed therewith," and these words were sufficient to pass a way used as a *quasi*-easement by the vendor over land retained by him.

Way of necessity.

Where a man, having a close surrounded by his own land, grants the close, the grantee shall have a way to his close over the grantor's land without any express words; for without it he cannot derive any benefit from his grant (*m*). This way is called "a way of necessity." In like manner, if a man grants the land surrounding his close, and retains the close, he has a way of necessity to the close; but in this case he has not a way for all purposes, but only so as to enable him to enjoy the close in the condition that it was in at the time of the grant (*n*).

Water.

The right to take water is an easement, not a profit *à prendre* (*o*).

Advowsons.

The origin of parish churches is, for the most part, their erection at an early date by the then lord of the manor, and his endowment of them with land, called glebe land, for the maintenance of the priest, and a house for his residence (*p*). This foundation of the church and its endowment gave the right, for all time to come, of presenting, *i.e.*, nominating, the minister to officiate in the church, which right of patronage was called an "advowson" (*q*).

(*k*) Elph. N. & C. Interp. 197. See also *Bayley* v. *G. W. R. Co.*, 26 Ch. Div. 434; *Brown* v. *Alabaster*, 37 Ch. Div. 490; *Thomas* v. *Owen*, 20 Q. B. D. 225; *Roe* v. *Siddons*, 22 Q. B. D. 224.

(*l*) *Ante*, p. 346.

(*m*) Elph. N. & C. Interp. 191.

(*n*) *Corporation of London* v. *Riggs*, 13 Ch. Div. 798.

(*o*) *Race* v. *Ward*, 4 E. & B. 702.

(*p*) See the Glebe Lands Act, 1888 (51 & 52 Vict. c. 20), as to sales of glebe lands by incumbents of benefices with approval of the Land Commissioners (now the Board of Agriculture); 1 K. & E. 580. The building and endowment of churches are now effected under the provisions of the Church Building Acts, 1818 to 1884.

(*q*) See 3 Cruise, Dig., pp. 1, *et seq.*; Burton, Comp. [1222]; Elph. N. & C. Interp. 558, s.v. *Advowson*; and *Crompton* v. *Jarratt*, 30 Ch. Div. 298.

So long as there was no severance of the advowson from the manor, it was termed an "advowson appendant." But the owner might grant his advowson to another and so sever it from the manor, or might sever it by conveyance of the manor with express exception of the advowson (*r*). It then became an "advowson in gross," and must be conveyed, like any other separate incorporeal hereditament, by a deed of grant (*s*). After a severance, the advowson could not again become appendant, even if the manor and advowson became reunited in the same person (*t*). When not severed, the advowson would pass with the manor, even without mention of the appurtenances (*u*).

Next presentation.

The owner of an advowson may grant to another the right to the next presentation. But in case the grantee die before exercising this right, it will pass to his personal representatives, and not descend to the heir, as the advowson would descend on the death of the owner intestate (*x*).

Title on sale of advowson.

The Real Property Limitation Act, 1833 (*y*) provides that no advowson shall be recovered but within three incumbencies, and that period must not extend beyond one hundred years (*z*); therefore, on the sale of an advowson, it is said that (in the absence of agreement) (*a*) :—

"The title to an advowson must be carried back at least one hundred years; and the abstract should be accompanied by a list of the presentations during the period over which it extends. The rule, it is conceived, is the same, whether the advowson be sold as in gross or appendant; for although a sixty or now a forty years' title might be sufficient, if it could be shown that the advowson was in fact appendant to the principal estate, yet the purchaser, it may be contended, has a right to see that no destruction of the appendancy, by severance of the advowson, is disclosed by the earlier title" (*b*).

Tithes.

Tithes constituted part of the provision for the ministers of the Church, consisting of a tenth part of the yearly produce

(*r*) 2 Dav. Prec. i. 31, note.
(*s*) Co. Litt. 335 b.
(*t*) 2 Dav. Prec. i. 31, note.
(*u*) 2 Bl. 22.
(*x*) *Rennell* v. *Bishop of Lincoln*, 7 B. & C. 113; and 8 Bing. 490. As to the statutes against simony—31 Eliz. c. 6; 1 Will. & Mary, c. 16, and 12 Anne, c. 12; and their effect, see 2 Dav. Prec. i. 32, and *Walsh* v. *Bishop of Lincoln*, L. R. 10 C. P. 518; and notes to *Fox* v. *Bishop of Chester*, Tudor, L. C. R. P. 276.
(*y*) 3 & 4 Will. IV. c. 27, s. 30.
(*z*) Ss. 30—33.
(*a*) Dart, V. & P. 334.
(*b*) See 2 Dav. Prec. i. 30, for form of agreement for purchase of advowson with prospect of early possession, and at p. 356, form of grant of an advowson with the addition thereto at p. 357, note, to meet the Incumbents' Resignation Act, 1871, which Act has been amended by 50 & 51 Vict. c. 23; and see form of conveyance of advowson 1 K. & E. 579.

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of the soil. Originally, every one was at liberty to contribute his tithes to whatever church or priest he pleased (*c*). The whole soil of the country, however, becoming divided into certain ecclesiastical districts called parishes, the tithes of each parish became dedicated to the support of the church of the parish out of which they issued, and were payable accordingly to the incumbent. These "tithes in kind" were either "predial," arising from the vegetable produce of land, or "mixed," arising from the animal produce.

Tithe rent-charge.

Under Acts (*d*) of Parliament a rent-charge, varying with the price of corn, has now been substituted for tithes in kind (*e*).

Appropriations.

Where an ecclesiastical benefice is annexed in perpetuity to a spiritual corporation it is called "an appropriation" (*f*). On the dissolution of the monasteries the appropriations belonging to them were vested in the Crown by Statute (*g*). Spiritual persons or corporations were always capable of having their land discharged from tithes in various manners (*h*). On the dissolution of the monasteries most of the exemptions from tithes on their lands would have ceased, but for the provisions of the statute (*i*) which provides that all persons coming into the possession of the lands of any abbey then dissolved should hold them free and discharged from tithes in as large and ample manner as the abbey formerly held them, but this provision does not extend to the lands of the lesser monasteries. Many grants by the Crown have been made either of the land itself belonging to a dissolved monastery, which may, as above stated, be free from tithes in the hands of the grantee, or of an appropriation (*k*), which in lay hands is called an "impropriation," or of the tithes forming part of the appropriation.

Tithe free lands.

Tithes in lay hands.

(*c*) 2nd Inst. 641. See as to tithes, 3 Cruise, Dig. 57, *et seq.*; Burton, Comp., ch. VI., s. 3, p. 366.

(*d*) The Tithe Acts, 1836 to 1891; 6 & 7 Will. IV. c. 71; 7 Will. IV. & 1 Vict. c. 69; 1 & 2 Vict. c. 64; 2 & 3 Vict. c. 62; 3 & 4 Vict. c. 15; 5 & 6 Vict. c. 54; 6 & 7 Vict. c. 73; 7 & 8 Vict. c. 106; 23 & 24 Vict. c. 93; 32 & 33 Vict. c. 90; 41 & 42 Vict. c. 42; 42 & 43 Vict. c. 42; 43 & 44 Vict. c. 44; and 54 & 55 Vict. c. 8; see 2 Dav. Prec. 3, 827, and Lewis on the Tithe Acts, 3rd ed.

(*e*) See Lewis, Tithe Acts, 388, *et seq.*, as to the process of commutation.

(*f*) Eliz. N. & C. Interp. 561.

(*g*) 27 Hen. VIII. c. 28; 31 Hen. VIII. c. 13.

(*h*) 2 R. 32. *The Bishop of Winchester's Case*, 2 Rep. 44 a, note by Fraser. Tomlins, Law Dict. s.v. *Tithes*.

(*i*) 32 Hen. VIII. c. 13.

(*k*) Burton, Comp. 375, and 5 Cruise, Dig. 184. See Eliz. N. & C. Interp. 557, s.v. *Rectory*, and Shep. T. 12, 94, 253, 281; 3 Salk. 377; Com. Dig. *Ecclesiastical Persons*, c. 6. "Parsonage" is equivalent to "rectory;" see Co. Litt. 300 a; *b.* 301; Shep. T. 94.

Tithes, after they were diverted from their original purpose and had become the subject of property, would not pass on a conveyance of the land with its appurtenances, if not specially mentioned (*l*).

Apportionment and redemption of tithes.

Under the Tithe Acts (*m*), the tithe rent-charge may be apportioned or redeemed (in some cases only by agreement, in others compulsorily, at the instance of the landowner or the tithe rent-charge owner) by orders made by the Board of Agriculture, who now represent the Tithe Commissioners (*n*).

Merger.

Tithes and tithe rent-charge are regarded as hereditaments distinct from the lands out of which they arise; and therefore, not only do not pass (as above observed) by a conveyance of the land itself, but, at Common law, they do not merge where the tithe owner is also owner of the land (*o*). But, under the Tithe Acts, a tenant in fee simple or in tail in possession of tithes or rent-charge in lieu of tithes, or any person having power to acquire the fee simple in possession therein, or the tenant for life in possession of both lands and tithes, is enabled, by deed to be approved by the Board of Agriculture, and confirmed under their seal, to merge the tithes or commutation rent-charge in the land out of or on which they issue or are charged. And all charges on tithes, &c., which are merged under the Acts are to have priority over any charges on the lands at the time of the merger (*p*).

Land presumed subject to tithe.

On the sale of land, tithe rent-charge is a burden the existence of which is presumed in the absence of agreement (*q*). Where there has been a special apportionment of the rent-charge upon some particular portion of the estate in exoneration of the residue, the contract or conditions of sale should state either the fact or the amount actually payable (*r*). Upon the sale of tithes the vendor should protect himself from being required to produce the original grant (*s*), otherwise the abstract must show the original grant, as well as a sixty (or forty) years' title (*t*).

Title on sale of tithe.

(*l*) *Chapman* v. *Gatcombe*, 2 Bing. N. C. 516.

(*m*) *Ante*, p. 356, note (*d*).

(*n*) See 2 Dav. Prec. i. 627; and 5 Dav. Prec. ii. 223, note. As to extraordinary tithes, see 49 & 50 Vict. c. 54.

(*o*) Burton, Comp. [1214].

(*p*) 6 & 7 Will. IV. c. 71, s. 71; 1 & 2 Vict. c. 64; 2 & 3 Vict. c. 62; 9 & 10 Vict. c. 73, s. 19.

(*q*) Dart, V. & P. 399.

(*r*) *Ib.* 400, 401. In the absence of express stipulation, a purchaser cannot require the vendor to procure apportionment at the vendor's expense; *Re Ebsworth and Tidy*, 42 Ch. Div. 23, 35.

(*s*) Dart, V. & P. 188.

(*t*) Dart, V. & P. 336, and see note (*t*),

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Production of the original grant is the only mode of repelling any claim by an ecclesiastical person *jure ecclesiæ* (*u*). How far the same rule may be applicable to a sale of a rent-charge in lieu of tithe may be doubtful, but it is certain that to prevent any question the vendor should protect himself by a condition properly framed as to the title he is to adduce.

Franchise.

A franchise is a royal privilege or branch of the royal prerogative, subsisting in the hands of a subject by virtue of a grant from the Crown, either express or implied from long enjoyment. The principal franchises are (1) liberties to hold Courts; (2) grants of *jura regalia* and Counties Palatine; (3) grants of forest; (4) liberty to make a park; (5) free warren; (6) the right to have the goods of felons; (7) to have waifs and strays; (8) to hold a fair or market; (9) to keep a ferry (*x*).

Annuity.

"An annuity is a yearly payment of a certain sum of money granted to another in fee for life or years, charging the person only" (*y*).

Where it is limited for an estate of inheritance, it is a hereditament. Words of limitation, which, when applied to land, create an estate tail, when applied to a personal annuity create a fee simple conditional (*z*), for it cannot be entailed, as it is not a tenement within the Statute *De Donis* (*a*), but it is a personal hereditament.

Like remarks apply to certain annuities granted by the Crown and charged on Customs duties or other branches of the public revenue (*b*).

Rents.

"Three manner of rents there be, that is to say, rent-service, rent-charge, and rent-seck. Rent-service is where the tenant holdeth his land of his lord by fealty and certain rent, or by

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and 2 Dav. Prec. i. 32, note, as to whether or not s. 1 of V. & P. Act, 1874 (37 & 38 Vict. c. 78), applies to tithes, so as to make forty years' title sufficient.

(*u*) Smith's Law of R. & P. Prop. 46.

(*x*) See as to franchises, 3 Cruise, Dig. 244; Burton, Comp. [1034]; Chitty on Prerog. 118, *et seq.*; Elph. N. & C. Interp. 581, and the authorities there cited. As to Courts, see *ib.* 568, 592, and a most interesting article in L. Q. R., vol. v., p. 113 (add to the authorities there cited *Pitt* v. *Revers*, Cro. El. 791.) As to Counties Palatine, Elph. N. & C. Interp. 568. As to forests, *ib.* 580; park, *ib.* 606; warren, *ib.* 629; waifs and strays, *ib.* 573; fairs and markets, *ib.* 595; ferry, *ib.* 574, where the cases are collected. Forfeiture of goods for felony was abolished by 33 & 34 Vict. c. 23.

(*y*) Co. Litt. 144 b.

(*z*) *Turner* v. *Turner*, Amb. 776; see *ante*, p. 64.

(*a*) *Ante*, p. 65.

(*b*) *Stafford* v. *Buckley*, 2 Ves. Sen. 170; *Holdernesse* v. *Carmarthen*, 1 Bro. C. C. 377.

homage, fealty, and certain rent, or by other services and certain rent. And if rent-service at any day, that ought to be paid, is behind, the lord may distrain for that of common right" (*c*).

Rent-service can only be created where a tenure is created, and therefore it cannot be created on a grant in fee simple since the Statute of *Quia Emptores* (18 Edwd. I. c. 1); in other words, since that Statute, it can only be created where an estate of freehold less than a fee simple, or an estate for years is created, leaving a reversion in the grantor.

Rent-charge and rent-seck.

A rent-charge and a rent-seck are thus defined by Littleton (*d*):—

"If a man by deed indented at this day (*e*) maketh such a gift in fee tail, the remainder over in fee; or a lease for life, the remainder over in fee; or a feoffment in fee (*f*); and by the same indenture he reserveth to him and to his heirs a certain rent, and that if the rent be behind, it shall be lawful for him and his heirs to distrain, &c.: such a rent is a rent-charge; because such lands or tenements are charged with such distress by force of the writing only, and not of common right. And if such a man, upon a deed indented, reserve to him and his heirs a certain rent without any such clause put in the deed, that he may distrain, then such rent is rent-seck; for that he cannot come to have the rent, if it be denied, by way of distress."

By the Landlord and Tenant Act, 1730 (*g*), the power of distress was made incident to a rent-seck in the same manner as to rent reserved upon a lease.

Rent-charge, remedies for securing.

Before 1882 it was the practice to give, by way of further security for a rent-charge, power to the grantee on the rent being in arrear for forty days to enter on the land charged and to retain possession till his claim was satisfied out of the rents and profits. And by the Conveyancing and Law of Property Act, 1881 (*h*), under instruments coming into operation after 1881, if and as far as a contrary intention is not expressed thereby, where a person is entitled to receive out of any land, or its income, any annual sum charged on the land or income, by way of rent-charge or otherwise, not being rent incident to a reversion, he is to have, so far as they might have been conferred by the instrument, the following remedies—namely: (1) distress after twenty-one

(*c*) Litt. s. 213; and see Elph. N. & C. 617; s.v. *Rents*; Leake, Us. & Prof., Part II., Ch. III., pp. 372, *et seq.*; Burton, Comp., Ch. VI., s. 2, p. 333.

(*d*) S. 217.

(*e*) *I.e.*, since the Statute of *Quia Emptores*.

(*f*) In such cases the grantor has no reversion.

(*g*) 4 Geo. II. c. 28; see also Wms. R. P. 401.

(*h*) 44 & 45 Vict. c. 41, s. 44; *post*, p. 472.

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days' arrear, for arrears; (2) entry and possession till payment, after forty days' arrear, for arrears then due, or becoming due during his possession; and (3) also after forty days' arrear, whether taking possession or not, by deed (*i*) to demise the land charged to a trustee for a term by mortgage, sale, or demise, or by any other reasonable means, to raise and pay the annual sum and all arrears due or to become due. These provisions closely resemble the express power usually inserted in settlements made before 1882 for securing an annuity on the land, except that it was more common to limit a term instead of giving power to limit one (*k*).

Apportionment.

Formerly, a rent-charge could not be apportioned, "because the rent is entire and against common right, and issuing out of every part of the land" (*l*), and there is no tenure between the grantor and grantee as there is in the case of a rent-service. Therefore, if the owner of a rent-charge purchased any part of the land out of which it issued (*m*), or any part of the land were released from it, the rent-charge became extinct (*n*), but it was otherwise if the owner of the rent-charge acquired a portion of the land by descent, for he did not acquire it by his own act (*o*). But by the Inclosure Act, 1854 (*p*), provision was made for apportionment of the rent by the Inclosure Commissioners (now the Board of Agriculture), among the lands charged on the application of any persons respectively interested (*q*) in the lands and in the rent, in all cases where any lands or hereditaments are charged with any fee-farm rent, rent-seck, rent of assize (*r*), or chief rent, or other annual or periodical fixed rent, or other certain payment.

Release.

And by the Law of Property Amendment Act, 1859 (*s*), the owner of the rent-charge was enabled to release part of the land without thereby extinguishing the charge: the Act provided:—

(*i*) See example, 3 Dav. Prec. ii. 1049.

(*k*) See 3 Dav. Prec. ii. 1039 and 1041.

(*l*) Co. Litt. 147 b.

(*m*) And this is still so where advantage is not taken of the Inclosure Act, 1854 (17 & 18 Vict. c. 97), to effect apportionment; see Dart, V. & P. 147, 1043.

(*n*) *Ib.* 1044.

(*o*) Litt. s. 224.

(*p*) 17 & 18 Vict. c. 97, ss. 10—14; and see 1 Dav. Prec. 545, 687.

(*q*) As to who are such persons, see Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 16.

(*r*) *I.e.*, the certain established rents of the freeholders and ancient copyholders of a manor, which cannot be departed from or varied—that is, the quit rents above spoken of: 2 Bl. 42.

(*s*) 22 & 23 Vict. c. 35, s. 10. See *Booth* v. *Smith*, 14 Q. B. D. 318.

S. 10. "The release from a rent-charge of part of the hereditaments charged therewith shall not extinguish the whole rent-charge, but shall operate only to bar the right to recover any part of the rent-charge out of the hereditaments released, without prejudice nevertheless to the rights of all persons interested in the hereditaments remaining unreleased, and not concurring in or confirming the release."

In respect of lands required for public undertakings, special provision is made by the Lands Clauses Consolidation Act, 1845 (*t*), for the release of the lands from any rent-charge affecting them, whether the whole or a part only be charged on them.

Escheat.

Formerly there was no escheat of a rent-charge, for it was not held of any lord, and on the death of the owner intestate and without heirs, it simply ceased to exist. By the Intestates' Estates Act, 1884, the law of escheat will apply where after the 14th August, 1884, a person dies "without an heir, and intestate in respect of any real estate consisting of any estate or interest, whether legal or equitable, in any incorporeal hereditament" (*u*); but there is some difficulty in seeing how this provision can apply to a rent-charge, which is held of no lord.

Redemption.

By the Conveyancing and Law of Property Act, 1881 (*x*), provision is made, on the requisition of the owner of the land, or of any person interested therein, out of which a rent-charge or other annual sum issues, for payment to the person absolutely entitled thereto in fee simple in possession, or empowered to dispose thereof absolutely or to give an absolute discharge for its capital value, of such sum as is certified by the Board of Agriculture (*y*) to be its value. Thus redemption may be effected of any "quit rent," "chief rent," "rent-charge, or other annual sum," but not of a tithe rent-charge, or rent reserved on a sale or lease, or rent payable under a grant or licence for building purposes, or any payment issuing out of land not being perpetual.

Annuities, by way of rent-charge.

Annuities, by way of rent-charge, whether for life or years, or in fee, are often limited by wills and settlements. A rent-charge may be created by grant operating at Common law; but in this case, the grantee has not seisin of the annuity until some payment has been made in respect of it. It is more commonly

(*t*) 8 Vict. c. 18, ss. 115—118.

(*u*) 47 & 48 Vict. c. 71, ss. 4, 7. See the remarks of Mr. Challis, R. P. 37.

(*x*) 44 & 45 Vict. c. 41, s. 45.

(*y*) Substituted by 52 & 53 Vict. c. 30, s. 2, for the Land Commissioners, who (45 & 46 Vict. c. 38, s. 48) replaced the Copyhold Commissioners.

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created by a conveyance of the land itself to the use that the grantee shall take the rent, in which case the grantee is in possession on the execution of the deed by virtue of the Statute of Uses (*z*). Where an annuity or rent-charge has been granted, otherwise than by marriage settlement, or will, for one or more life or lives, or for any term of years, or greater estate determinable on one or more life or lives, it must be registered in order to affect lands as to purchasers, mortgagees, or creditors, according to the provisions of the Judgments Act, 1855 (*a*). But, notwithstanding that the annuity deed has not been registered, the annuity will be valid against all subsequent incumbrancers who take with notice, and against the trustee in bankruptcy of the grantor (*b*). The statutory provisions as to executions (*c*) do not apply to annuities, therefore on a purchase or mortgage search should also be made in respect of them in the Central Office of the Supreme Court of Judicature (*d*).

Fee-farm rents.

A common form of rent-charge is that known as "fee-farm," which arises where land is sold (generally for building purposes) in fee-simple, subject to a perpetual rent-charge. Formerly (*e*), it was essential to reserve a power of distress; for since the Statute of *Quia Emptores*, the grantor parting with the fee is without any reversion, and without a reversion there cannot be a rent-service: so the rent reserved in such case, if power of distress were not expressly given, would be a rent-seck (*f*). The true meaning of "fee-farm" seems to be a perpetual farm or rent; the name being founded on the perpetuity of the rent (*g*). In order to effectually secure the payment of the rent-charge, the purchaser is usually made to covenant to erect buildings of a certain value, and to keep them in repair (*h*). But it has been recently decided that where land has been granted in fee, in consideration of a rent-charge, and a covenant to build and repair buildings, the assignee of the grantee of the land is not liable, either at law, or in equity, on the ground of notice, to the

(*z*) 27 Hen. VIII. c. 10, ss. 4, 5; Elph. Introd. 12; *Heelis* v. *Blain*, 18 C. B. (N. S.) 90. See forms in Dav. Conc. Prec. 177, 489.

(*a*) 18 & 19 Vict. c. 15, ss. 12, 14.

(*b*) *Greaves* v. *Tofield*, 14 Ch. Div. 563.

(*c*) *Post*, p. 387, *et seq.*

(*d*) See Elph. & Cl., Searches, 107, 108.

(*e*) Before 4 Geo. II. c. 28; *ante*, p. 359.

(*f*) *Reditus siccus*. The above is the reason given by Hargrave (note 5), 143 b, Co. Litt., quoting Littleton, 215, 216.

(*g*) Not on the *quantum*, as represented by Blackstone, vol. ii. 43; see Hargrave's note to Co. Litt. 143 b.

(*h*) See forms, 2 Dav. Prec. i. 504; and Dav. Conc. Prec. 176.

assignee of the grantee of the rent-charge, on the covenant to repair (*i*). In order to secure the rent-charge the purchaser is made to covenant to pay the rent. But it may now be taken as settled law that the obligation of such a covenant cannot run with the land so as to bind the assignee of the purchaser, though he take with notice (*k*).

Chief rents.

"Chief rents" are the fixed rents paid by the freeholders of a manor, and they, and also rents paid by the copyholders, are called "quit rents" (*l*), because thereby the tenant goes free of all other services (*m*).

Quit-rents.

(*i*) *Haywood* v. *Brunswick Building Society*, 8 Q. B. D. 403; *ante*, p. 168, note (*p*).

(*k*) Dart, V. & P. 865; *ante*, p. 168, note (*p*). Before 3 & 4 Will. IV. c. 27, s. 36, abolished real actions, a real action would lie for recovery of a rent-charge in fee; but that remedy having been abolished, an action of debt is maintainable; *Thomas* v. *Sylvester*, L. R. 8 Q. B. 368; see *Christie* v. *Barker*, 53 L. J. Q. B. 537; *Ex parte Graham*, 42 Ch. Div. 343; *Searle* v. *Cooke*, 43 Ch. Div. 519; *Re Herbage Rents*, [1896] 2 Ch. 811; *Pertwee* v. *Townsend*, [1896] 2 Q. B. 129.

(*l*) *Quieti reditus.*

(*m*) 2 Bl. 42.

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CHAPTER XIV.

CONVEYANCES—INVOLUNTARY ALIENATION.

PART I.—*Conveyances.*

OCCASIONAL reference has been made in former chapters to some of the different assurances or modes of Conveyance which have, from time to time, been employed for effecting the alienation of land, or creating interests in it. It will be proper, however, to treat of these modes of conveyance in more detail (*a*).

I. Feoffment.

The ancient mode of conveyance by a subject (*b*) was a Feoffment (*c*). It is applicable only to the conveyance of the freehold of corporeal hereditaments, in possession (*d*).

The words "feoffment," "to enfeoff" (*feoffare* or *infeudare*, to give one a fee-simple (*e*)), express the process of conveyance by "livery of seisin"—that is, delivery of the corporeal possession of the land, or of something as a symbol of the land (*f*). A record of the conveyance was generally, but not necessarily, made by a writing, called a Charter of Feoffment; but the land passed by the livery, not by the charter. It was the practice to endorse on the charter a memorandum that the livery had been made (*g*). It became usual for the feoffor to affix a seal to the charter by way of giving it greater solemnity; and such writing, sealed and delivered to any person, was called a deed (*factum*) (*h*).

(*a*) Forms of modern conveyances, and also of the obsolete forms of Feoffment, Lease, and Release, &c., will be found in Stud. Prec. They are explained in Elph. Introd., Ch. V.; 4 Cruise, Dig.; and Sand. Us., vol. ii.

(*b*) Conveyances by the Crown are of record, 5 Cruise, Dig. 45.

(*c*) As to feoffments, see Butler's note to Co. Litt. 271 b; Burton, Comp., Ch. I., s. 1; 4 Byth. & Jarm. 37; 4 Cruise, Dig. 46; Shep. T. 203; Digby, R. P. 49, 143; Challis, R. P. 363; Wms. R. P., pp. 141, *et seq.*

(*d*) 2 Bl. 310.

(*e*) See Spelm. Gloss, s.v. "Feofare," where he points out that "feofare" is properly applied to fee-simple, "donare" to fee tail; cf. Litt. s. 57. Mr. Challis (R. P. 364) remarks that "feoffment" is often, but improperly, applied to livery of seisin for any estate of freehold; see Butler's note (1) to Co. Litt. 271 b.

(*f*) *Ante*, p. 268; 2 Bl. 310, *et seq.*; Digby, R. P. 49, note, 145; *post*, p. 366.

(*g*) There is a presumption that livery of seisin was duly made; see *Ecclesiastical Commissioners* v. *Treemer*, [1893] 1 Ch. 166, at p. 172.

(*h*) Coke (Co. Litt. 9 a) says that there

Operative words.

A charter of feoffment was in form an authentication of a previous transaction, and by it the feoffor declared that he had "granted and enfeoffed,"—referring thereby to the previous act, —and went on to add, that he did thereby "grant, enfeoff, and confirm" (*i*). If the usual "general words" (*k*) were inserted, the charter itself, as distinct from the livery, might pass certain rights which were usually enjoyed with, but which were not strictly appendant or appurtenant to the land of which livery was made.

Limitation.

By the charter of feoffment was marked out the interest which the feoffee was to take under it, whether for life, in tail, or fee-simple; and this was called "limiting" the estate. In modern times this limiting of the estate is still necessary in a feoffment or in any other description of assurance (*l*).

Feoffments by corporations.

Feoffments were previously to the Real Property Act, 1845 (*m*) used on conveyances by corporations (*n*); for it was said a corporation could not stand seised to a use (*o*), and therefore the Lease and Release (*p*), which became the common form of assurance between individuals, could not be resorted to by a corporation, as the lease took effect under the Statute of Uses.

Writing.

Writing was not essential until 1677, when it was provided by the Statute of Frauds:—

Statute of Frauds. 29 Car. II. c. 3.

S. 1. "That from and after the 24th day of June, 1677, all leases (*q*), estates, interests of freehold or terms of years, or any uncertain interest of, in, to, or out of any messuages, manors, lands, tenements or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or

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is a difference between a charter (*carta*) and a deed (*factum*), "for *carta* is intended a charter which doth touch inheritance." The usual form of delivery at the present day is to touch the seal and say "I deliver this as my act and deed." See more about deeds, Elph. Introd., Ch. IV., articles on "The Form and Execution of Deeds," in 30 Sol. J. 636, 651, 667; the introduction and notes to Dav. Prec.; and Wms. R. P. 148; and as to the conveyances now disused, see 2 Bl. 295; 4 & 5 Cruise, Dig.; Piggott on Recoveries. As to the construction of deeds, see Elph. N. & C. Interp.

(*i*) See form in Stud. Prec. 128; 2 Dav. Prec. 244; 2 Sand. Us. 102; and, for ancient forms, Digby, R. P. 61, 144.

(*k*) See *ante*, p. 346.

(*l*) As to limitations in fee-simple, see *ante*, p. 82, and in tail, *ante*, p. 63.

(*m*) 8 & 9 Vict. c. 106.

(*n*) 2 Dav. Prec. i. 177.

(*o*) *Ante*, p. 292; 1 Cruise, Dig. 340; 4 *ib.* 49.

(*p*) *Post*, p. 370.

(*q*) The second section of the Statute excepts leases not exceeding three years from the making, and on which a rent of two-thirds at least of the full improved value is reserved. See *ante*, p. 151.

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estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect; any consideration for making any such parol leases or estates or any former law or usage to the contrary notwithstanding."

S. 3. "That no leases, estates, or interests, either of freehold or terms of years, or any uncertain interest, not being copyhold or customary interest, of, in, to, or out of any messuages, manors, lands, tenements or hereditaments, shall at any time after the said 24th day of June be assigned, granted, or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting, or surrendering the same, or their agents thereunto lawfully authorized by writing or by act and operation of law."

Deed.

By the Real Property Act, 1845 (*r*), a feoffment made after the 1st of October, 1845, other than one made under a custom by an infant, is void at law unless evidenced by deed.

Feoffment by infant.

A feoffment by an infant, although it need not be evidenced by deed, must be evidenced by writing, signed by the infant, who, at the time of the feoffment, must be in actual possession of the land (*s*).

Livery of seisin,

Livery of seisin was of two kinds—livery "in deed," and livery "in law." They are thus described by Blackstone (*t*):—

—in deed.

"Livery in Deed is thus performed. The feoffor, lessor, or his attorney, together with the feoffee, lessee, or his attorney (for this may as effectually be done by deputy or attorney, as by the principals themselves in person), come to the land, or to the house; and there in the presence of witnesses, declare the contents of the feoffment or lease, on which livery is to be made. And then the feoffor, if it be of land, doth deliver to the feoffee, all other persons being out of the ground, a clod or turf, or a twig or bough there growing, with words to this effect: 'I deliver these to you in the name of seisin of all the lands and tenements contained in this deed.' But, if it be of a house, the feoffor must take the ring, or latch of the door, the house being quite empty, and deliver it to the feoffee in the same form; and then the feoffee must enter alone, and shut to the door, and then open it, and let in the others. If the conveyance or feoffment be of divers lands, lying scattered in one and the same county, then in the feoffor's possession, livery or seisin of any parcel, in the name of the rest, sufficeth for all; but, if they be in several counties, there must be as many liveries as there are counties. For, if the title to these lands comes to be disputed, there must be as many trials as there are counties, and the jury of one county are no judges of the notoriety of a fact in another. Besides, anciently this seisin was obliged to be delivered *coram paribus de vicineto*, before the peers or freeholders of the neighbourhood, who attested such delivery in the

(*r*) 8 & 9 Vict. c. 106, s. 3.

(*s*) As to feoffments by infants, see 2 Dav. Prec. 245, note; 4 Cruise, Dig. 49; Challis, R. P. 368; *Re Maskell and Goldfinch*, [1895] 2 Ch. 525.

(*t*) 2 Bl. 315. See 4 Cruise, Dig. 46; Challis, R. P. 365; Co. Litt. 48 a.

body or on the back of the deed: according to the rule of the feudal law, *pares debent interesse investiturœ feudi, et non alii:* for which this reason is expressly given; because the peers or vassals of the lord, being bound by their oath of fealty, will take care that no fraud be committed to his prejudice, which strangers might be apt to connive at. And though, afterwards, the ocular attestation of the *pares* was held unnecessary, and livery might be made before any credible witnesses, yet the trial, in case it was disputed (like that of all other attestations) was still reserved to the *pares* or jury of the county. Also, if the lands be out on lease, though all lie in the same county, there must be as many liveries as there are tenants: because no livery can be made in this case, but by the consent of the particular tenant; and the consent of one will not bind the rest. And in all these cases it is prudent, and usual to endorse the livery of seisin on the back of the deed, specifying the manner, place, and time of making it: together with the names of the witnesses. And thus much for livery in deed.

Livery in law.

"Livery in Law is where the same is not made on the land, but in sight of it only: the feoffor saying to the feoffee, 'I give you yonder land, enter and take possession.' Here, if the feoffee enters during the life of the feoffor, it is a good livery, but not otherwise; unless he dares not enter, through fear of his life or bodily harm; and then his continual claim, made yearly, in due form of law, as near as possible to the lands, will suffice without an entry. This livery in law cannot, however, be given or received by attorney, but only by the parties themselves."

Tortious operation.

At Common law any person in possession of the land, even if he were only tenant for life (*u*) or for years, or had no estate in the land (*x*), could make a feoffment. If the feoffor was not seised, or if, being seised, he attempted to convey an estate greater than his own estate, the feoffment, by what was called a tortious operation, divested the whole fee simple out of the true owner (*y*), and it therefore necessitated a re-entry on his part in order to revest in himself the estate of which he had been thus disseised (*z*). A feoffment made after 1st October, 1845, has no tortious operation (*a*).

"Discontinuance" by tenant in tail.

A feoffment by a tenant in tail who was actually seised operated as a "discontinuance" of the tenancy in tail, and divested all remainders and the reversion expectant on the estate tail, and the only remedy of the issue in tail and the remaindermen or reversioners was a real action (*b*).

(*u*) A feoffment by a tenant for life operated as a forfeiture of his estate; Co. Litt. 251 a.

(*x*) 4 Cruise, Dig. 50 (s. 30); *Fitzherbert* v. *Fitzherbert*, Cro. Car. 483; *Whaley* v. *Tankard*, 2 Lev. 52; *Parkhurst* v. *Smith*, Willes, 341; Butler's note to Co. Litt. 330 b; Challis, R. P. 371; 4 Byth. & Jarm. 43.

(*y*) See, for an exception, Challis, R. P. 371, note.

(*z*) Litt. s. 611.

(*a*) 8 & 9 Vict. c. 106, s. 4.

(*b*) 2 Bl. 275; Challis, R. P. 373;

From its nature, a feoffment is applicable only to a conveyance of land in possession. Where the subject-matter does not admit of livery of seisin, as, for example, an incorporeal hereditament; or is not in immediate possession, as, for example, a remainder or reversion, it is not a fitting subject for an assurance of this nature. Interests of this kind were from an early time conveyed by what is termed a "grant" (*c*), that is, a deed unaccompanied by livery of seisin; and therefore corporeal hereditaments, where the right to possession is immediate, are said to "lie in livery," while estates in expectancy, and other incorporeal hereditaments, are said to "lie in grant."

But a reversion on a lease for years may be conveyed by feoffment with livery of seisin, with the consent of the tenant for years (*d*), for the owner in fee simple has not parted with the seisin, but only placed as it were a bailiff on his property (*e*).

Attornment.

Until the Act 4 Anne, c. 16, in every case of a grant of an estate in remainder or reversion after an estate of freehold or a term of years, the attornment of the tenant was necessary to complete its effect (*f*).

Grant does not operate by wrong.

There being no livery of seisin, a grant did not operate by wrong, but only passed that which might be rightfully granted, and grants are therefore sometimes called "innocent conveyances" (*g*).

Operative words of grant.

The operative word usually employed in grants is "grant;" but other words suffice if they show an intention to convey (*h*).

By the Conveyancing and Law of Property Act, 1881 (*i*), it is declared that the use of the word "grant" is not necessary to convey tenements or hereditaments, corporeal or incorporeal.

Since the Real Property Act, 1845 (*k*), which provided that from the 1st October, 1845, all corporeal tenements and hereditaments should, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery, a

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Litt. s. 595; Co. Litt. 326 b. As to the effect of warranty in barring an estate tail which was discontinued, see 6 L. Q. R. 280.

(*c*) Co. Litt. 172 a; 4 Byth. & Jarm. 105; 2 Sand. Us. 29. See, however, an article on "Feoffment and Livery of Incorporeal Hereditaments, in 5 L. Q. R., p. 29.

(*d*) Co. Litt. 48 b, note 8.

(*e*) *Ante*, pp. 159, 229.

(*f*) *Ante*, p. 232.

(*g*) Co. Litt. 332 a.

(*h*) Shep. T. 232; Elph. N. & C. Interp. 42.

(*i*) 44 & 45 Vict. c. 41, s. 49.

(*k*) 8 & 9 Vict. c. 106, s. 2.

simple deed of grant will convey, and is the ordinary mode of conveying, the freehold in possession, as well as remainders, reversions, and incorporeal hereditaments (*l*).

III. Release.

A Release has been defined to be :—

"The conveyance of a man's interest or right which he hath to a thing to another who hath possession thereof, or some estate therein" (*m*).

By deed.

Such release "must of necessity," says Lord Coke (*n*), "be by deed."

When the estate of the person wishing to convey is in remainder or reversion, a feoffment would be inapplicable, for as he has no possession he cannot make livery. But, where A. is a tenant for life or for years, with remainder to B. in fee; if B. desires to give up his estate to A., this can be effected by a release by B. which operates as a conveyance to A. of the fee; and A., instead of remaining tenant only for either life or years as the case might be, would thenceforth become seised in fee. The smaller interest, under the effect of the release, becomes merged or extinguished in the larger. Again, one joint tenant cannot enfeoff the other, for each is in possession of the whole of the land; but he can convey his interest in the land to the other by a release (*o*). On the other hand, one tenant in common cannot release to his companion, because they have distinct freeholds (*p*).

IV. Lease, entry, and release.

When land became the subject of frequent transfer, the inconveniences of a personal resort to the spot to make livery of seisin, gave rise to devices for avoiding the necessity of so doing. One of these devices consisted of a combination of a Lease and a Release. A Lease operating at Common law was made to the person to whom the land was to be conveyed; and after he had entered into possession under his lease (*q*) a Release was executed to him of the fee. He thus acquired an estate in fee as effectually as if a feoffment had been made to him (*r*).

(*l*) See form, 2 Dav. Prec. i. 229. And as to the effect of the word "grant" in implying covenants for title, see Co. Litt. 384 a; 4 Cruise, Dig. 357; Elph. Introd. 87.

(*m*) Bac. Abr., tit. Release; see 4 Cruise, Dig. 77; Challis, R. P. 375; Elph. Introd. 3; 5 Dav. Prec. "Reléases;" 2 Sand. Us. 73.

(*n*) Co. Litt. 264 b.

(*o*) 4 Cruise, Dig. 78 (s. 33); *ante*, p. 257.

(*p*) Bac. Abr., tit. Release; *ante*, p. 264.

(*q*) The lessee, until he makes entry, acquires only an *interesse termini* (*ante*, p. 159), unless the lease operates as a declaration of use (in which case, by virtue of the Statute of Uses, the term vests in him by the execution of the lease).

(*r*) See note (*r*), *post*, p. 370.

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Bargain and sale.

To avoid the necessity of entry by the lessee, advantage was taken of a bargain and sale. Blackstone (*s*) says that a Bargain and Sale (*t*)—

"Is a kind of real contract, whereby the bargainor for some pecuniary consideration, bargains and sells, that is, contracts to convey the land to the bargainee; and becomes by such bargain a trustee for, or seised to the use of, the bargainee; and then the Statute of Uses completes the purchase; or, as it has been well expressed, the bargain first vests the use, and then the statute vests the possession. But as it was foreseen that conveyances, thus made, would want all those benefits of notoriety, which the old Common law assurances were calculated to give; to prevent therefore clandestine conveyances of freeholds, it was enacted in the same session of Parliament, by statute 27 Hen. VIII. c. 16, that such bargains and sales should not enure to pass a freehold, unless the same be made by indenture, and enrolled within six months in one of the Courts of Westminster-Hall, or with the *custos rotulorum* of the county."

Statute of Enrolments.

Bargain and sale for year.

In order to avoid the publicity which the enrolment gave to conveyances, the ingenuity of lawyers with the aid of the Statute of Uses, invented a modification of the old Common law conveyance by Lease and Release (*u*).

A Bargain and Sale for a term of years did not require enrolment, for the Statute of Enrolments (27 Hen. VIII. c. 16) spoke only of estates of inheritance or freehold; and, as we have seen, by virtue of the Statute of Uses, it vested in the bargainee an estate in possession, on which a release, therefore, could operate, so that there was no necessity for the actual entry by the lessee which was required under the earlier form of conveyance by Lease and Release. The device, therefore, resorted to in order to get rid of the inconveniences of the Statute of Enrolments, and also of the necessity of actual entry to perfect the lease, was simply to make a bargain and sale (*x*) for a short term, generally a year, for a nominal pecuniary consideration, under which the bargainee stood in the position of the lessee under the Common

(*r*) Co. Litt. 270 a; Y. B. 11 Hen. IV. 33, pl. 61; 31 Assis. pl. 25; 47 Edwd. III. pl. 76. See, as to this mode of conveyance, 2 Sand. Us. 74; 4 Cruise, Dig. 113; Wms. R. P. 154, 194.

(*s*) 2 Bl. 338.

(*t*) Elph. Introd. 13; Cruise, Dig. 97; 3 Byth & Jarm. 216; 2 Sand. Us. 53.

(*u*) Elph. Introd. 13; 4 Cruise, Dig. 113; Challis, R. P. 383; see the form, 2 Bl., Appendix ii.; Wms. R. P. 593; and Stud. Prec. 141.

(*x*) Which after the Statute of Frauds must be in writing, no rent being reserved, and was usually by deed.

law lease after entry, and his estate was by reason of his possession capable of enlargement by the operation of a release; which was given by a contemporaneous deed, generally dated the following day (*y*).

It may be added that uses, which would be executed by the Statute, could be declared on the seisin of the releasee (*z*). This form of conveyance is commonly said to be by Lease and Release; but it is more properly described as a Bargain and Sale for a year, followed by a Release.

Lease and Release.

Originally there were two distinct deeds, the Lease (Bargain and Sale) and the Release, and it was the practice to recite the former in the latter, and to state the property to be in the actual possession of the releasee by the double operation of the Lease and the Statute for transferring uses into possession (*a*). By an Act of the present reign, intituled, An Act for rendering a Release as effectual for a Conveyance of Freehold Estates, as a Lease and Release between the same parties (*b*), it was declared that every instrument purporting to be a Release, and expressed to be made in pursuance of the Act, should be as effectual as if a bargain and sale, or lease for a year, had been executed, although not executed in fact.

Act abolishing lease for a year.

Finally, the Real Property Act, 1845 (*c*), made a deed of grant sufficient (*d*). The result of this statute has been the disuse of conveyances by lease and release, or by release under the statute 4 & 5 Vict. c. 21, and practically all deeds of conveyance have become deeds of Grant. But a bargain and sale of freeholds will still operate under the Statute of Uses if enrolled within six months after its date (*e*).

Deed of grant made sufficient.

The only conveyances in use at the present day for the conveyance of freeholds in possession are deeds of grant, bargains and sales (at Common law) by executors (*f*), conveyances under a statutory authority such as a conveyance by a tenant for life under the Settled Land Act, 1882 (*g*), and conveyances operating as appointments of a use (*h*). Bargains and Sales enrolled,

(*y*) 2 Bl. 339. See as to this form of conveyance, 2 Sand. Us. 75; Wms. R. P. 197.

(*z*) 2 Sand. Us. 76.

(*a*) See form in Wms. R. P. 593; Stud. Prec. 141.

(*b*) 4 & 5 Vict. c. 21 (repealed by Statute Law Revision Act, 1872, No. 2). See 2 Sand. Us. 85, note.

(*c*) 8 & 9 Vict. c. 106, s. 2.

(*d*) *Ante*, p. 368.

(*e*) 2 Dav. Prec. i. 179.

(*f*) *Ante*, p. 299.

(*g*) *Ante*, p. 51.

(*h*) *Ante*, p. 299.

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covenants to stand seised, and feoffments, may still be used, but in practice are obsolete.

Transmutation of Possession.

Assurances of freeholds may be divided into two classes:—*First*, where the legal estate passes at Common law, or by the operation of some statute other than the Statute of Uses; and *second*, where the assurance operates as the declaration of a use only, so that the purchaser takes the legal estate by the operation of the Statute of Uses. Assurances of the former class are said to operate by "transmutation of possession," or more properly "transmutation of seisin," but we use the former phrase, as it is commonly used. The practical distinction between conveyances of the two classes arises when uses are declared on the seisin of the purchaser (*i*); for, if the conveyance is of the former class the person in whose favour the uses are declared takes the legal estate by the effect of the Statute of Uses, but if the conveyance is of the latter class the legal estate remains in the purchaser, and the person in whose favour the uses are declared takes an equitable estate only.

The phrase "transmutation of possession" is not very happy, for, as we shall proceed to show, some of the conveyances which are said to operate by transmutation of possession really effect no change of seisin or even of possession, either because the conveyance is made to a person already in seisin or possession, or because it merely confers the legal estate on the purchaser, and so gives him a right to go into possession without actually putting him into possession, or because it confers only a reversionary legal estate. In fact, when at the present day we say that a conveyance operates by transmutation of possession, all that we mean is that it confers the legal estate without the aid of the Statute of Uses. Probably the expression took its origin from the fact that the ordinary assurance employed at Common law to convey or create a freehold interest, *viz.*, a feoffment, derived its efficacy from livery of seisin, so that to transfer the seisin and to confer the legal estate became synonymous phrases.

The difficulty in understanding the meaning of transmutation of seisin arises from the change in meaning of the word seisin. Formerly it meant the actual possession of a freeholder; now it means "having the legal estate, either in possession or remainder

(*i*) "Purchaser" is here used in its technical sense, as the person to whom the land is conveyed, whether for value or not.

or reversion," provided that it has not been turned into a mere right of entry, as where a wrongdoer has obtained actual possession.

The principal assurances operating by transmutation of possession which are found in abstracts may be divided into four classes :—

Conveyances operating by transmutation of possession—Feoffment.

First, where both the seisin and possession are changed. This is the case in a feoffment, in which case livery is made to the purchaser by the person in possession of the land, and in a fine or recovery, in which cases livery was made, in theory at least, by the sheriff (*k*).

Lease, Entry, and Release.

Second, where the purchaser already has possession or seisin, so that no livery can be made to him. In this case he is capable of acquiring the fee by a release. For example, if A. makes a Common law lease to B., and B. enters, A. can subsequently release the fee simple to B., and on this being done, B. becomes seised in fee simple; his term becomes merged in the fee, and his possession is changed into seisin (*l*). If the release is made before B.'s entry, it is void at Common law, though at the present day it would take effect as a statutory deed of grant. In like manner, if B. is seised as tenant for life in possession, and A. is entitled in fee simple in remainder or reversion, A. can release to B., who thus becomes seised in fee simple, and his estate for life becomes merged in the fee. In this case B. was seised of a legal estate before the release was made, and the effect of the release is not to change B.'s seisin, but only to enlarge his estate.

In the case of joint tenancy, as before mentioned (*m*), each joint tenant has seisin of the whole. Therefore a release by one joint tenant to the other does not change the seisin of the latter, but only changes the nature of his estate.

Lease and Release.

Third, where the conveyance only confers the legal estate and right to the seisin on the purchaser, leaving him to acquire actual seisin by entry. A person who is deemed to be in possession by virtue of a conveyance operating under the Statute of Uses can take a release without having actually entered. For example, if

(*k*) As to fines, see 5 Cruise, Dig. 93; and *ante*, pp. 69, *et seq.* As to recoveries, see the form 2 Bl., Appendix xvii.; and *ante*, pp. 66, *et seq.*

(*l*) "Poterit etiam quis terram alicui concedere ad terminum annorum, et ille eandem infra terminum illum alteri dare, vel eidem, in feodo, *et sic mutare unam possessionem in aliam, si firmarium feoffaverit;*" Bracton, lib. ii., cap. 9, fol. 27, cited in Digby, R. P. 176.

(*m*) *Ante*, p. 255.

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A., seised in fee simple, bargains and sells his land for a term to B. for pecuniary consideration, a use arises in favour of B., and by the effect of the statute he is deemed to be in possession; and whether he actually enters or not, A. can release the fee to him, and on the release being made B. acquires the legal estate in fee simple. This is the conveyance known as a lease and release (*n*). So, bargains and sales (at Common law) by executors (*o*), and conveyances which operate by virtue of a statute, such, for instance, as a deed of grant, so far as it operates to convey freeholds in possession, are conveyances of this class. It should be noticed that a conveyance by a tenant for life under the Settled Land Act, 1882, may apparently operate either by transmutation of possession or as a declaration of uses, as may be necessary. In practice such conveyances are always framed so as to operate by transmutation of possession. There is much theoretical difficulty in seeing how uses can take effect, where the land is in the possession of the vendor, before the entry on the land of the person who takes the legal fee, *i.e.*, the grantee to uses, under a conveyance of the class now being considered, for he can hardly be said to be seised before he has actually acquired possession. If uses exhausting the whole fee are declared on the seisin of the grantee, he is never intended to enter, and perhaps it may be held that the entry of the *cestui que use*, which is only lawful on the supposition that the grantee to uses was seised, operates so as to confer an instantaneous seisin on the grantee to uses out of which all the uses as they arise are fed.

Fourth, where the conveyance confers the legal estate on the purchaser, and either confers the immediate seisin without the right to possess, or does not even confer the immediate seisin.

There are two cases:—*First*, where the land is in the possession of a tenant for years; *second*, where a tenant for life, or a tenant in tail, is seised of the land. In the first case the fee simple subject to the term, in the second case the fee simple in reversion or remainder, can, and always could, be passed by a deed of grant, though, before the Statute of Anne (*p*) the

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(*n*) *Ante*, p. 370.

(*o*) *Ante*, p. 299.

(*p*) 4 Anne, c. 16. See *ante*, p. 171. If the conveyance operated under the Statute of Uses, the purchaser in either case acquired seisin by virtue of the statute without attornment.

purchaser did not acquire seisin, in the first case of the immediate fee, in the second case of the reversionary fee, until the attornment of the tenant. It will be observed that in the first of these cases the purchaser acquires seisin without possession, and in the latter case he does not acquire either possession or immediate seisin. All that he acquires is seisin of the reversionary fee simple.

Conveyances operating without transmutation of possession.

A conveyance, which does not operate by transmutation of possession, in other words, which passes the legal estate by virtue of the Statute of Uses, is either, a covenant to stand seised (*q*), a bargain and sale enrolled, or an appointment under a power (*r*).

V. Assignments of leases.

A lease (*s*) may be either for a life or lives, or for years (*t*). Leases of the former class occur but rarely at the present day, and it will be sufficient to remember that, as they confer a freehold interest, they could be created or transferred (prior to the Real Property Act, 1845 (8 & 9 Vict. c. 106)) only by an assurance which transferred the seisin either at Common law or by the Statute of Uses (*u*).

In writing.

The instrument of conveyance of leaseholds or terms of years which, by the Statute of Frauds (*x*), was required to be in writing, is properly an Assignment; but the words "conveyance" and "convey" are popularly used in regard to assurances generally, whether of freehold or leasehold. By the Real Property Act, 1845 (*y*), an assignment of a chattel interest, not being copyhold, in any tenements or hereditaments, made after 1st October, 1845, is void at law unless made by deed.

By deed.

Covenants in assignments.

In an assignment of leaseholds it is the practice for the purchaser to covenant with the vendor to perform and observe, during the rest of the term, the covenants by the lessee contained in the lease, and to indemnify the vendor against them (*z*). If the vendor is the original lessee, he is liable to the reversioner

(*q*) See Elph. Introd. 76.

(*r*) *Ante*, p. 299.

(*s*) Elph. Introd. 225: 4 Cruise, Dig. 54; 5 Dav. Prec., Part II.

(*t*) Litt. s. 57.

(*u*) See *Ecclesiastical Commissioners* v. *Treemer*, [1893] 1 Ch. 166. "Leasehold," in common parlance, imports a chattel interest; *per* Lord Ellenborough, C.J., *Doe* d. *Digby* v. *Steel*, 3 Camp. 116.

(*x*) 29 Car. II. c. 3, s. 3; *ante*, p. 151.

(*y*) 8 & 9 Vict. c. 106, s. 3; *ante*, p. 86. As to assignment of chattels real belonging to a married woman (and not her separate estate), see 2 Dav. Prec. i. 219; Dart, V. & P. 577.

(*z*) As to the implied covenant by each assign to indemnify the lessee against breaches of covenant during his own tenancy, see *Moule* v. *Garrett*, L. R. 5 Ex. 132; 7 Ex. 101; *Craig's Claim*, [1895] 1 Ch. 267. The express covenant is not inserted if the vendor will be under no continuing liability after the assignment.

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in damages for a breach of these covenants at any time during the term: if the vendor is an assign, he has entered into the covenant under discussion with his vendor, and is therefore liable to indemnify his vendor against a breach, at any time during the term, of the lessee's covenants contained in the lease. In either case it is only reasonable to insert the covenant under discussion in the assignment.

For title, express.

It was the practice before 1882 to insert in an assignment of leaseholds express qualified (*a*) covenants for title by the assignor, that the lease was good, that the rents and covenants by the lessee had been paid, performed, and observed, for right to assign, for quiet enjoyment, for freedom from incumbrances, and for further assurance.

Implied.

But these covenants are omitted in assignments after 1881, as by the Conveyancing and Law of Property Act, 1881 (*b*), in a conveyance of leasehold property to a purchaser on a sale, there are implied covenants with the assignee by the person who conveys (*c*) and is expressed to convey, "as beneficial owner," for right to convey, for quiet enjoyment, for freedom from incumbrances, and for further assurance, and also for the validity of the lease. These implied covenants are in such terms as to extend only to the acts of the covenantor and of persons through whom he derives title otherwise than by purchase for value; and for this purpose a marriage settlement is not a purchase for value (*d*).

Underlease operating as Assignment, or *vice versâ*.

Where a term of years is granted by a person who is himself only a termor, and the term granted equals or exceeds in duration the term held by the lessor, the underlease operates as an assignment of that term (*e*); and conversely, if the assurance purports to be an assignment, and a term less than the term held by the assignor is granted, the assignment will operate as an underlease.

Covenants for title to freeholds, viz.:—

It was the practice in conveyances of freeholds for valuable consideration made before 1882, to insert the following covenants, called "covenants for title" (*f*) by the vendor beneficially entitled,

(1) For right to convey;

that is to say—(1) a covenant (called the covenant for right to convey) that, notwithstanding anything done or omitted by the

(*a*) See *post*, p. 377.

(*b*) 44 & 45 Vict. c. 41, s. 7, § 1 (A.) (B.).

(*c*) "Conveyance" includes "assignment," the word ordinarily used in respect of leaseholds; s. 2 (v.).

(*d*) 1 K. & E. 398.

(*e*) 2 Prest. Abst. 5; 2 Prest. Conv. 124; Elph. Introd. 273; *Beardman* v. *Wilson*, L. R. 4 C. P. 57, and *ante*, p. 181, note (*i*).

(*f*) See Elph. N. & C. Interp. 473.

vendor or his ancestors or testators, the parties conveying have power to convey the property to the purchaser for the estate expressed to be limited; (2) a covenant (called the "covenant for quiet enjoyment") against any lawful disturbance by the vendor or any one lawfully claiming through him, or through his ancestors or testators; (3) a covenant (called the "covenant against incumbrances") for freedom from incumbrances created by the vendor, or his ancestors or testators; and (4) a covenant (called the "covenant for further assurance") by the vendor, and all persons lawfully claiming through him, his ancestors or testators. It was formerly usual to preface these covenants by a covenant, that notwithstanding anything done by the vendor, his ancestors or testators, the conveying parties were seised in fee; or, where the conveyance was by appointment, that the power was well created and is in force; but such a covenant being obviously implied in the covenant for right to convey, its use was for some years before 1882 generally abandoned (*g*).

(2) Quiet enjoyment;

(3) Against incumbrances;

(4) For further assurance.

It will be observed that these covenants are "qualified," *i.e.*, that they extend only to the acts and omissions of the vendor, his ancestors and testators, *i.e.*, persons through whom he derives title otherwise than by purchase for value, and persons claiming under them. These covenants, so qualified, do not warrant that the vendor has a title, but only that he conveys the estate as he received it, and not in any way made worse by his own acts or those of the persons against whose acts he covenants (*h*). In a mortgage in fee simple, similar covenants without words of qualification were inserted, and the covenants are said to be absolute, *i.e.*, they extend to predecessors in title who were purchasers for value, as well as to ancestors and testators (*i*).

—qualified, in conveyances on sale; no warranty of title.

—absolute, in mortgages.

(*g*) See 2 Dav. Prec., Part I., p. 191; Elph. Introd. 101; 1 K. & E. 398.

(*h*) See *per* Lord Eldon, C.J., in *Browning* v. *Wright*, 2 B. & P. 13, cited in Elph. N. & C. Interp. 475. The absence of a warranty is supplied by investigation of title; see Wms. R. P. 550, *et seq.* Platt on Covenants, 304. After conveyance the maxim *caveat emptor* applies, and the purchaser's only remedy for defects of title is under the covenants for title; see *Johnson* v. *Johnson*, 3 Bos. & P. 162, at p. 170, *per* Lord Alvanley, C.J.

(*i*) See 4 Cruise, Dig. 384. The theory is that a vendor's covenants should extend to the acts of himself and his predecessors in title up to and including the last purchaser for value, who himself in the ordinary course obtained similar covenants from his own vendor. A purchaser, it is assumed, takes the benefit of all covenants for title entered into by previous vendors, so that there is no one in the chain of title against whose acts there is not a covenant. See an elaborate work on "Covenants for Title," by an American writer, Mr. W. H. Rawle (at pp. 30, *et seq.*); and Dart, V. & P. 616; 5 Byth. & Jarm. Rob. 215.

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Trustees, mortgagees, and other fiduciary vendors, generally covenanted only that they had done no act to incumber their estate or to prevent their granting it.

Implied covenants for title.

It is provided by the Conveyancing and Law of Property Act, 1881 (*k*), that in a conveyance for valuable consideration other than a mortgage, there shall be implied by the person who conveys and is expressed to convey "as beneficial owner," the covenants (qualified as above mentioned) for right to convey, for quiet enjoyment, for freedom from incumbrances, and for further assurance; and that in any conveyance by any person who conveys and is expressed to convey "as trustee," or "as mortgagee," or in other fiduciary character as therein mentioned, a covenant against incumbrances shall be implied (*l*).

The Act provides that the benefit of the covenants implied as aforesaid shall be annexed and incident to, and shall go with, the estate or interest of the implied covenantee, and shall be capable of being enforced by every person in whom that estate or interest is from time to time vested (*m*).

This "sub-section," it has been observed (*n*), "makes all covenants implied under this section run with the land so as to be enforceable by every person interested under the conveyance. It precludes any difficulty as to what covenants do or do not run with the land. An implied covenant under this section will therefore be more valuable than the ordinary covenant."

Title to reversion on lease.

By the Vendor and Purchaser Act, 1874 (*o*), under a contract to *grant or assign* a term of years, whether out of a freehold or leasehold estate, the intended lessee or assign is not entitled to call for the title to the freehold. And under contracts since 1881, by the Conveyancing and Law of Property Act, 1881, if and as far as a contrary intention is not expressed in the contract, the intended assign, *i.e.*, the *purchaser*, on the sale of an underlease cannot call for the title to the leasehold reversion (*p*); and, on a contract to *grant* a lease for a term out of a

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(*k*) 44 & 45 Vict. c. 41, s. 7.

(*l*) S. 7 (1), (A. and F.). The character in which the conveyancing party acts, viz., "as beneficial owner," &c., must be expressed. See, on the construction of the clause, *David* v. *Sabin*, [1893] 1 Ch. 523.

(*m*) 44 & 45 Vict. c. 41, s. 7 (6).

(*n*) W. B. & C., note to s. 7 (6), p. 41.

(*o*) 37 & 38 Vict. c. 78, s. 2. This does not affect the rule that a lessee has constructive notice of his lessor's title; *Patman* v. *Harland*, 17 Ch. Div. 353.

(*p*) 44 & 45 Vict. c. 41, s. 3 (1), but see *post*, p. 445, note (*m*).

leasehold interest with a leasehold reversion, the intended lessee has no right to call for the title to that reversion (*q*).

"Demise." Covenants implied by word.

The operative words of a lease, usually though not necessarily employed, were formerly "demise, grant, and to farm let" (*r*)—"*demisi concessi et ad firmam tradidi.*" The word "demise" only is now commonly used. By the demise (*s*) two covenants by the lessor with the lessee are implied, one a covenant that the lessor has power to create the term, and the other for quiet enjoyment during such part of the term as elapses while the lessor's interest continues, unless the lease contains, as is usual, an express covenant for quiet enjoyment, limited to interruption by the lessor or any person claiming through him (*t*).

Valuable consideration (*u*).

The motive which induces a person to enter into a contract or make an assurance is called "valuable consideration" where it is either (1), an intended marriage; (2), some right, interest, profit, or benefit, accruing to him or, at his request, to a stranger; or (3), some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other party to the contract or assurance.

A few examples will render this more clear.

A., in consideration of an intended marriage between B. and C., covenants with D. to pay him a sum of money if the marriage takes place. A., in consideration of £100 paid to him, conveys a field to B. A. agrees with B. to give up a right of way over B.'s field, on having another right of way conveyed to him; or that he will pay £100 to B., if B. goes to Paris; or, if he will become surety for A. In each of these cases, A. is said to agree or convey for "valuable consideration," or, shortly, "for value."

Where the consideration is some act or forbearance done or suffered at the time of the conveyance, it is said to be "executed;"

(*q*) 44 & 45 Vict. c. 41, s. 13. See Elph. Introd. 226.

(*r*) As to the meaning of "farm," see P. & M. Hist. i. 273; ii. 113; 2 Bl. 318.

(*s*) It has recently been decided that these covenants are not implied unless the word "demise" is used as an operative word; *Baynes* v. *Lloyd & Sons*, [1895] 1 Q. B. 820; 2 Q. B. 610 (discussed 39 Sol. J. 444).

(*t*) Elph. N. & C. Interp. 422, 424; Elph. Introd. 266. See *Dennett* v. *Atherton*, L. R. 7 Q. B. 316; and that, where there is no express covenant, the implied covenant for quiet enjoyment is limited to breaches occurring during the continuance of the lessor's interest; see *Schwartz* v. *Locket*, 38 W. R. 142; *Baynes* v. *Lloyd & Sons*, [1895] 1 Q. B. 820; 2 Q. B. 610.

(*u*) See Dyer, 336 (b) (34); Pollock on Contract, Ch. IV., p. 164; Elph. Introd. 67; Elph. N. & C. Interp. 145.

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where it consists of a covenant to do, or abstain from doing, something, in the future, it is said to be "executory."

"Good consideration."

The motive which causes a man to enter into a contract or make an assurance is called "good consideration" where it is the affection that he bears towards a blood relation, or towards the husband or wife of a blood relation.

If a man enters into a contract, or makes an assurance, from any motive other than valuable or good consideration, he is said to act "without consideration." An assurance not made for valuable consideration is called "voluntary" (*x*).

Persons who claim under a voluntary assurance are called "volunteers."

It should be noted that, though no consideration appear on the face of a conveyance, evidence is admissible to prove that there was in fact consideration for the conveyance (*y*).

PART II.—*Involuntary Alienation.*

Forfeiture on Attainder (*z*).

As the law stood immediately before the 4th July, 1870, the day on which the Forfeiture Act, 1870 (*a*), received the royal assent, a tenant in fee simple on attainder (*b*) of high treason forfeited his land to the Crown absolutely; on attainder of felony, he forfeited his land to the Crown for a year and a day, during which period the Crown could commit all manner of waste (*c*), and after the expiration of that period, in cases of murder (*d*), it escheated to the lord of whom it was held, on account of the corruption of blood produced by the attainder.

Of tenant in fee.

Of tenant in tail.

On the attainder of high treason of a tenant in tail in possession, or entitled to a right of entry, his estate tail was forfeited

(*x*) See *ante*, p. 110, as to voluntary settlements.

(*y*) See Elph. N. & C. Interp. 145 (Rule 39), citing (*inter alia*), Shep. T. 510; *Townend* v. *Toker*, L. R. 1 Ch. 459.

(*z*) See Chitty, Prerog. 216; 4 Byth. & Jarm., s.v. *Forfeiture*, Tudor, L. C. R. P., note to *Att.-Gen.* v. *Sands*, p. 785.

(*a*) 33 & 34 Vict. c. 23.

(*b*) *I.e.*, judgment and sentence of death. Attainder must be carefully distinguished from conviction, which is where a man is outlawed, or appears and confesses, or is found guilty by the inquest. And it should be observed that there is no attainder until judgment; mere conviction does not cause attainder; see Co. Litt. 390 b; and 4 Bl. 380, 381, where it is remarked that the difference between a man *convicted* and a man attainted was frequently overlooked. (The note in Tudor, L. C. R. P. 785, to *Att.-Gen.* v. *Sands*, is inaccurate in this respect).

(*c*) 2 Inst. 37.

(*d*) The Corruption of Blood Act, 1814 (54 Geo. III. c. 145).

to the Crown, which acquired the land during the life of the tenant in tail and during the existence of any heirs of the person attainted who would have been capable of inheriting the estate tail if there had been no attainder (*e*). By attainder of a tenant in tail for felony, the land was forfeited during the life of the tenant in tail, or during the year and day, whichever period was the longer.

Of tenant for life—Chattels.

By conviction (*f*), even without attainder, of high treason or felony, the offender forfeited his chattels both real and personal, and on attainder he forfeited the profits of his estates for life of every nature.

On attainder of a copyholder his estate was forfeited to the lord, not to the Crown (*g*).

Outlawry.

Outlawry (*gg*) was a process to force a person accused of a crime, or the defendant in a civil action, to appear. In case of outlawry for treason or felony the law interprets the absence of the accused as sufficient evidence of his guilt, with the consequences of corruption of blood and forfeiture. In other cases the profits of the outlaw's lands, while the outlawry remained in force, and his goods and chattels were forfeited to the Crown (*h*). The outlawry of a copyholder appears to create no forfeiture except for a capital crime (*i*).

33 & 34 Vict. c. 23.

The Forfeiture Act, 1870 (*k*) provides that:—

> S. 1. "From and after the passing of this Act, no confession, verdict, inquest, conviction, or judgment of or for any treason or felony or felo de se shall cause any attainder or corruption of blood, or any forfeiture or escheat; provided that nothing in this Act shall affect the law of forfeiture consequent upon outlawry."

Outlawry in civil proceedings, which had become obsolete, was abolished as from the 15th August, 1879, by the Civil Procedure Acts Repeal Act, 1879 (*l*). The result is that at the present day the only case in which outlawry can affect any interest in property is that of a person being outlawed on criminal process.

Execution.

Where a man obtains judgment in the Supreme Court (*m*) to

(*e*) 1 Cruise, 90, where the earlier law is stated.

(*f*) Co. Litt. 391 a.

(*g*) Scriv. Cop. 211.

(*gg*) See P. & M. Hist. i. 459; *ib.* ii. 447, 578.

(*h*) *The Queen* v. *Simpson*, 10 Mod. 378, *per* Parker, C.J.

(*i*) See Scriv. Cop. 213.

(*k*) 33 & 34 Vict. c. 23.

(*l*) 42 & 43 Vict. c. 59, s. 3.

(*m*) We do not discuss the methods of enforcing judgments of inferior courts. "A judgment of the Supreme Court" in the text includes judgments and orders of all divisions of the High Court, including

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recover a sum of money he can enforce it against the property of his debtor by execution.

Execution in ordinary cases is effected by a writ of *Fieri Facias*, or by a writ of *Elegit*, or by the appointment of a Receiver (*n*).

Writ.

A writ is a command given by the Queen under seal to a person to do or abstain from doing something. Thus a peer is commanded by the Queen to attend Parliament by a writ of summons under the Paper Seal, now substituted in certain cases for the Great Seal (*o*). An action at the present day commences with a writ of summons, which is a command from the Queen, under the seal of the Supreme Court, to the defendant "to cause an appearance to be entered for you in an action at the suit of A. B."(*p*) Formerly there were a great many different forms of writs by which actions could be commenced, and such writs were called "writs original," as distinguished from "writs judicial" (*q*), which were writs issued during the progress or at the end of an action.

Fi. Fa. (*r*).

The writ of *Fieri Facias*, commonly called *fi. fa.*, is a remedy given to a judgment creditor at Common law. It is a writ addressed to the sheriff, by virtue of which he seizes the goods and chattels of the judgment debtor and sells them, and in practice applies the proceeds in payment to the judgment creditor of the amount due to him, instead of paying them into Court as directed by the writ.

Under a *fi. fa.*, the sheriff can sell the debtor's legal term of years, but probably not his equitable interest in it. He has no power to enter into the debtor's land, and he cannot give possession of the land to the purchaser, who is left to obtain it by an action to recover possession of the land. As against the debtor himself, the term is bound from the *teste* (*i.e.*, date) of the writ, but after the Statute of Frauds (*s*) it was not bound as against strangers till the writ was delivered to the sheriff; and by virtue

those made in the Bankruptcy jurisdiction. Elph. & Cl., Searches, 25.

(*n*) See for a full account of these and other methods of execution, Anderson on the Law of Execution; Edwards on Execution.

(*o*) See the Crown Office Act, 1877 (40 & 41 Vict. c. 41), s. 4.

(*p*) See forms in R. S. C., Appendix (A.), Part I.

(*q*) Co. Litt. 73 b. *Jehu Webb's Case*, 8 Rep., at 48 a.

(*r*) Elph. & Cl., Searches, 68; see form of *fi. fa.* in R. S. C., Appendix (H.), No. 1.

(*s*) 29 Car. II. c. 3, s. 16; Elph. & Cl., Searches, 69.

of the Mercantile Law Amendment Act (*t*), the writ was not to prejudice a title to the land where before actual seizure such title is acquired by a *bonâ fide* purchaser for value without actual notice before he purchased that the writ had been delivered to the sheriff. These provisions have been repealed and re-enacted by the Sale of Goods Act, 1893 (*u*).

Elegit (*x*).

The writ of *Elegit* is a remedy which was originally given to the judgment creditor by the Statute of Westminster 2nd (*y*), but which has been greatly modified by modern legislation (*z*). In its present form it is a command from the Queen to the sheriff directing him to deliver to the judgment creditor all the lands of the judgment debtor, to hold the same until the amount of his debt with interest shall be levied. On the receipt of the writ the sheriff, acting throughout by his under-sheriff, holds an inquiry, called an Inquisition, before a jury, for the purpose of ascertaining what lands in his bailiwick belong to the debtor, what estate he has in them, and their annual value, called the "extended value." This proceeding is entirely *ex parte*; no notice of it is given to the debtor, and nothing is done on the land itself. When the inquisition is complete, a formal statement of the proceedings under it is drawn up and sealed by the sheriff and the jurors. The sheriff then makes up and signs a formal statement of all that he has done in obedience to the writ, which statement, when signed, is called the "return to the writ"; and he afterwards sends the writ and the return to the writ to the Supreme Court. This final act is sometimes called the "return of the writ." The return *to* the writ must be carefully distinguished from the return *of* the writ; the difference between them is the same as the difference between writing a letter and posting it.

The instant that the return to the writ is made, the lands comprised in it are said to be "delivered in execution" to the execution creditor: the effect of this is to confer on him a legal right of entry, which he can enforce against the execution debtor by an action to recover possession, or by actual entry without an

(*t*) 19 & 20 Vict. c. 97.

(*u*) 56 & 57 Vict. c. 71, s. 26. That these provisions apply to leaseholds, as being "goods," see *O'Brien* v. *Murray*, 17 Ir. C. L. Rep. 46.

(*x*) Elph. & Cl., Searches, 62; see form in R. S. C., Appendix (H.), No. 3; Edwards on Execution, pp. 163, *et seq.*

(*y*) 13 Edwd. I. c. 18. See 2nd Inst. 39.

(*z*) 1 & 2 Vict. c. 110; The Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 146. See the history of the writ in Wms. R. P. 251.

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action if his entry is not opposed, and by virtue of which, if the land is in the occupation of tenants of the execution debtor, he can distrain upon the tenants for rent becoming due after the land is delivered in execution.

The execution creditor who obtains possession or receipt of the rents and profits is said to be *Tenant by Elegit;* he has a chattel interest which he may hold till his debt with interest is satisfied out of the rents and profits (*a*).

Under an *Elegit* all land can be seized in which the debtor has a legal estate in possession (as opposed to remainder), or subject only to a term of years or to an equitable mortgage; or the entire equitable fee; or a legal term of years, or a copyhold estate, or land over which he has a disposing power (*b*) which he can without the consent of any other person exercise for his own benefit.

Fi. fa. de bonis ecclesiasticis (*c*).

The private property of a beneficed clergyman is of course liable to be taken in execution, and the tithes and other profits of his benefice may be made available by proper proceedings. At Common law no writ ever issued to a sheriff to levy a judgment debt on ecclesiastical property (*d*). In lieu thereof, when a judgment has been recovered against a beneficed clergyman, and where it appears (*e*) upon the return of a *fi. fa.* or an *elegit*, that the debtor is a beneficed clerk and has no goods and chattels nor any lay fee in the bailiwick of the sheriff, the execution creditor is entitled, as soon as the return of the writ is filed, to sue out a writ (*f*) of *fi. fa. de bonis ecclesiasticis*, or of *sequestrari facias de bonis ecclesiasticis*, the procedure under which is substantially the same. This writ is addressed and delivered to the Bishop. The Bishop executes the writ by issuing from his registry another writ (*g*) called a writ of sequestration by which a person (generally the nominee of the judgment creditor), called a sequestrator, is appointed to get in the profits of the benefice and to apply them first in providing for the cure of souls within the parish and the performance of divine service by some minister approved by the

(*a*) Co. Litt. 43 b; 2 Cruise, Dig. 54; Anderson on Execution, 396; Edwards on Execution, 185.

(*b*) As to whether this includes the power of a tenant in tail to bar the remainderman, see Elph. & Cl., Searches, 20.

(*c*) See Anderson on Execution, pp. 428 *et seq.*; Edwards on Execution, pp. 199, *et seq.*

(*d*) *Per* Alvanley, C.J., *Arbuckle* v. *Cowtan*, 3 Bos. & P., at 328.

(*e*) R. S. C. Order XLIII. r. 3.

(*f*) See the forms of these writs, R. S. C., Appendix (H.), 5, 6, 7.

(*g*) See the form, Chitty's Forms, 573.

Bishop (*h*), for the repairs (*i*) of the parsonage house and other buildings and tenths payable out of the benefice, and secondly in payment of the judgment debt. The sequestrator may be required by the Bishop who is answerable for the money received by him (*k*) to enter into a bond for the due discharge of his duties and to account for the moneys he receives (*l*). The sequestrator must publish the writ of sequestration, generally by affixing a copy on the church door, and his powers extend only to moneys accruing due after the publication (*m*). The sequestrator can take proceedings to recover such moneys in his own name (*n*). He is entitled to the possession or rents of the glebe, and may let it (*o*), but he cannot deprive the minister of the possession of the parsonage house, for the minister is required by law to reside in it (*p*). The sequestrator has to render and file half-yearly accounts in the Bishop's registry. The sequestration comes to an end on the death, resignation (*q*) or deprivation of the incumbent, or on the judgment being satisfied. A writ of *fi. fa. de bonis ecclesiasticis*, or of *sequestrari facias de bonis ecclesiasticis*, is not returnable till the sum marked on it is raised. The return is in the form "*fieri feci*," or "*nulla bona.*"

Receiver (*r*).

A Receiver is a person appointed by the Court to receive the rents and profits or income of specified property, whether real, chattel real or chattel personal, or of any legal or equitable interest therein.

By the Supreme Court of Judicature Act, 1873 (*s*), the Court may appoint a Receiver "in all cases in which it shall appear to

(*h*) The stipend of the minister is in the discretion of the bishop; *Pack* v. *Tarpley*, 9 A. & E., at 484, subject to the provisions of the Sequestration Act, 1871 (34 & 35 Vict. c. 45).

(*i*) See the Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43).

(*k*) *Cottle* v. *Warrington*, 5 B. & Ad. 447.

(*l*) *Cuddington* v. *Withy*, 2 Swanst. 174.

(*m*) *Waite* v. *Bishop*, 1 C. M. & R. 507.

(*n*) The Sequestration Act, 1849 (12 & 13 Vict. c. 67), s. 1.

(*o*) *Powell* v. *Hibbert*, 15 Q. B. 129.

(*p*) *Pack* v. *Tarpley*, 9 A. & E. 468; *Doe* d. *Rogers* v. *Meare*, 1 Cowp. 129; The Pluralities Act, 1838 (1 & 2 Vict. c. 106), ss. 32, *et seq.*

(*q*) See as to restraints on resignation by an incumbent whose living is sequestered, the Sequestration Act, 1871 (34 & 35 Vict. c. 45), s. 7.

(*r*) Elph. & Cl. Searches, 71; Edwards on Execution, pp. 311, *et seq.*; *Wills* v. *Luff*, 38 Ch. Div. 200; and *Re Shephard*, 43 Ch. Div. 131. See the principles of "equitable execution" by means of a receiver discussed in *Levasseur* v. *Mason and Barry*, [1891] 2 Q. B. 73; *Holmes* v. *Millage*, [1893] 1 Q. B. 551; *Harris* v. *Beauchamp Brothers*, [1894] 1 Q. B. 801; *Cadogan* v. *Lyric Theatre, Ltd.*, [1894] 3 Ch. 338.

(*s*) 36 & 37 Vict. c. 66, s. 25.

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the Court to be just or convenient that such order should be made." A somewhat wide construction has been placed on this provision; and, in practice, in all cases where a judgment creditor cannot have the debtor's lands delivered to him under an *elegit*, he can obtain the appointment of a Receiver of the rents and profits (*t*). The Receiver, when appointed, has to give security, and has to pay all moneys received by him into Court; and from time to time the moneys, after providing for costs and the Receiver's remuneration, are paid to the execution creditor towards satisfaction of his debt. The appointment of a receiver operates as "actual delivery in execution" under the Judgments Act, 1864 (*u*), and as completed execution under the Bankruptcy Act, 1883, s. 45 (*x*).

Lien in Equity (*y*).

By the effect of the Judgments Act, 1838 (*z*), s. 13; the Law of Property Amendment Act, 1860 (*a*); and the Judgments Act, 1864 (*u*), an execution creditor who has obtained "actual delivery in execution," *i.e.*, by the return to the writ of *Elegit*, or by the appointment of a Receiver of his debtor's land, acquires a charge in equity on the land for the amount of his debt and interest, with the same remedies as if the debtor had agreed in writing to charge the land with the amount of the debt and interest. This charge only remains in force for three calendar months. The law with respect to it may be considered obsolete, as the creditor will in practice rely on his right to sell the land under the Judgments Act, 1864, s. 4 (*u*), which provides that an execution creditor to whom the land of his debtor has been "actually delivered in execution" and whose writ or process of execution (*c*) has been duly registered (formerly in the Central Office), now in the office of the Land Registry (*d*), may, while the registration remains in force, obtain from the Court of Chancery (now the Chancery Division) upon petition, an order for the sale of his debtor's land. The proceeds of sale are to be divided among the persons who may be found entitled thereto according to their priorities.

Sale on Petition (*b*).

It will be observed that the proceedings under an *Elegit* or on the appointment of a Receiver do not require anything to be done

(*t*) See, however, R. S. C. Order L. r. 15 a.
(*u*) 27 & 28 Vict. c. 112.
(*x*) See *post*, p. 389.
(*y*) Elph. & Cl. Searches, 38.
(*z*) 1 & 2 Vict. c. 110.
(*a*) 23 & 24 Vict. c. 38.
(*b*) Elph. & Cl. Searches, 39.
(*c*) The order appointing a receiver is a "process of execution."
(*d*) 51 & 52 Vict. c. 51, s. 5; see *post*, p. 387.

on the land itself, and do not require registration, unless for the purpose of obtaining a sale by the Court. The result was, that an intending purchaser of land had formerly no means of ascertaining whether land had been delivered in execution, and ran the risk of taking his conveyance, paying his purchase-money, and then discovering that the land had been delivered in execution to a creditor. This actually happened in the case of *Re Pope* (*e*), and it was held that the purchaser, although he had acquired the legal estate, was postponed to the creditor. In order to obviate this inconvenience, the Land Charges Registration and Searches Act, 1888 (*f*), was passed. This Act provides that:—

Land Charges Registration and Searches Act, 1888.

(S. 5) (1) "There shall be established and kept at the office of Land Registry a register of writs and orders affecting land, and there may be registered therein, in the prescribed manner, any writ or order affecting land issued or made by any Court for the purpose of enforcing a judgment, statute, or recognizance, and any order appointing a receiver or sequestrator (*g*) of land.

(2) "Every entry made in pursuance of this section shall be made in the name of the person whose land is affected by the writ or order registered.

(3) "The registration of a writ or order in pursuance of this Act shall cease to have effect at the expiration of five years from the date of the registration, but may be renewed from time to time, and, if renewed, shall have effect for five years from the date of the renewal.

(4) "Registration of a writ or order in pursuance of this section shall have the same effect as, and make unnecessary, registration thereof in the Central Office of the Supreme Court of Judicature in pursuance of any other Act.

(S. 6) "Every such writ and order as is mentioned in section five and every delivery in execution or other proceeding taken in pursuance of any such writ or order, or in obedience thereto, shall be void as against a purchaser for value of the land unless the writ or order is for the time being registered in pursuance of this Act.

"Provided that—

"(a) Where the writ or order is at the commencement of this Act registered in pursuance of the Act of the session held in the twenty-seventh and twenty-eighth years of Her Majesty, chapter one hundred and twelve, intituled 'An Act to amend the law relating to future judgments, statutes, and recognizances,' nothing in this section shall affect the operation of such writ or order until the expiry of the period for which it is so registered;

(*e*) 17 Q. B. D. 743; Elph. & Cl. Searches, 40.

(*f*) 51 & 52 Vict. c. 51. See Elph. & Cl. Searches.

(*g*) As to sequestration, see Elph. & Cl. Searches, 74; *Willcock* v. *Terrell*, 3 Ex. Div. 323; *Re Hastings*, 61 L. J. Q. B. 654.

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"(b) Where the proceeding in which the writ or order was issued or made is for the time being registered as a *lis pendens* in the name of the person whose land is affected by the writ or order, nothing in this section shall affect the operation of such registration."

It will be observed that the Act does not alter the law as between the execution creditor on the one part and the execution debtor, or volunteers claiming under him, or other execution creditors, on the other part; but only as between an execution creditor and purchasers for value (including mortgagees) claiming under the execution debtor. In order that the rights of the execution creditor may prevail over those of the purchaser for value, it is necessary that both delivery in execution and registration of the writ, or other process of execution, should take place before completion of the purchase.

The registration of executions under the Judgments Act, 1864 (*h*), was ascertained by searching the register kept at the Central Office, and the registration of executions under the Land Charges Registration and Searches Act, 1888, is ascertained by searching the register which is kept at the Land Registry Office. Provision is made for an official search, in the former case by the Conveyancing Act, 1882 (*i*), in the latter case by the Land Charges Registration and Searches Act, 1888 (*k*).

By the Settled Land Act, 1890 (*l*), the registration of a writ or order affecting land may be vacated by an order of the High Court, or any judge thereof.

Bankruptcy (*m*).

On a debtor being adjudicated bankrupt, all the property (including the right to exercise powers over property that he could exercise for his own benefit) which belonged to him at the commencement of the bankruptcy, and any property acquired by him before his discharge, with some exceptions not necessary to be discussed in this place (*n*), vest in the trustee in bankruptcy (*o*).

"Property," as defined by the Bankruptcy Act, 1883 (*p*), includes "land, and every description of property, whether real or personal," "also easements, and every description of estate

(*h*) 27 & 28 Vict. c. 112.
(*i*) 45 & 46 Vict. c. 39, s. 2.
(*k*) 51 & 52 Vict. c. 51, s. 17.
(*l*) 53 & 54 Vict. c. 69, s. 19.
(*m*) See a concise account of the repealed Acts in Elph. & Cl. Searches, 94.
(*n*) The Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44.
(*o*) *Ib.* s. 54.
(*p*) *Ib.* s. 168.

interest and profit, present or future, vested or contingent, arising out of or incident to property."

The trustee in bankruptcy is authorized (*inter alia*) to deal with any property to which the bankrupt is beneficially entitled as tenant in tail in the same manner as the bankrupt might have dealt with it (*q*).

It is provided (*r*) that an execution creditor "shall not be entitled to retain the benefit of the execution against the trustee in bankruptcy of the debtor unless he has completed the execution before the date of the receiving order and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor."

Within the meaning of this provision execution under a *fi. fa.* (*s*) is "completed" by the sale by the sheriff. Execution under an elegit (*t*) is completed by the return to the writ being made, even if the return of the writ is made after the receiving order; execution under an order appointing a receiver (*u*) is completed by the order being made.

Crown Debts (*x*).

At Common law the Crown can issue execution against all the lands, except copyholds and probably customary freeholds, which the debtor had at the time when he appeared by record (*y*) to be indebted to the Crown, and notwithstanding that he has since died or sold the lands. If execution is issued during the life of the debtor, it is called an "extent;" if after his death, a "*diem clausit extremum*."

Specialty debts due to the Crown payable "*Domino Regi, heredibus vel executoribus suis*" (*z*) and the balances due from army agents at the expiration of one month and after demand of payment (*a*) are deemed debts of record to the Crown.

(*q*) The Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 56 (5).

(*r*) *Ib.* s. 45. If the sheriff holds the goods for 21 days, an act of bankruptcy has been committed, and the execution is void against the trustee in bankruptcy; *Trustee of John Burns-Burns* v. *Brown*, [1895] 1 Q. B. 325.

(*s*) *Christie* v. *Winnington*, 8 Ex. 287; *Hernaman* v. *Bowcker*, 11 Ex. 760.

(*t*) *Re Hobson*, 33 Ch. Div. 493.

(*u*) *Ex parte Evans*, 13 Ch. Div. 252.

(*x*) See Elph. & Cl. Searches, 78; 1 Cruise, Dig. 60. *Re West London Commercial Bank*, 38 Ch. Div. 364; *Att.-Gen.* v. *Leonard*, *ib.* 622; *Re Bentinck*, [1897] 1 Ch. 673.

(*y*) A debt due to the Crown becomes a debt of record by the return to an inquisition taken on a commission to enquire whether the debtor owes any debt to Her Majesty; *Rex* v. *Mainwaring*, 2 Price, 67. See Elph. & Cl. Searches, 79.

(*z*) 33 Hen. VIII. c. 39. As to tax collectors, see the Taxes Management Act, 1880 (43 & 44 Vict. c. 19), ss. 76, 118, 119.

(*a*) The Regimental Accounts Act, 1808 (48 Geo. III. c. 128), s. 3.

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By the Crown Suits Act, 1865 (*b*), writs can be issued in respect of a debt due to the Crown without previously turning it into a debt of record.

Debts due to the Crown from certain officers or from receivers of "money imprest" (*i.e.*, money issued from the Treasury for the public service) or otherwise for the use of the Crown, commonly called "Accountants to the Crown," bind their land from the time of their entering into office (*c*).

The Crown can seize freeholds whether legal or equitable, lands that the debtor has contracted to sell or has sold, lands over which he has a general power of appointment by deed and leaseholds, but not copyholds.

The right of the Crown to seize lands that its debtor had sold was very dangerous to purchasers, and various Acts were passed mitigating this danger. It is now provided, by the Crown Suits Act, 1865 (*d*), that, after the 1st November, 1865, no future Crown debt or acceptance of office by an accountant to the Crown shall affect a *bonâ fide* purchaser or mortgagee, unless a writ or process of execution is issued and registered (now in the Central Office) before the execution of the conveyance or mortgage to him, and the payment of the purchase or mortgage money by him.

The head of the department to which an intending vendor or mortgagor is a debtor or accountant, or the Treasury, or the Commissioners of Customs, as the case may be, can enable the sale or mortgage to be safely carried out in the various manners mentioned in the Acts (*e*).

(*b*) 28 & 29 Vict. c. 104, s. 47.

(*c*) 13 Eliz. c. 4.

(*d*) 28 & 29 Vict. c. 104, s. 48.

(*e*) See the Judgments Act, 1839 (2 & 3 Vict. c. 11), s. 10; the Treasury Instruments (Signature) Act, 1849 (12 & 13 Vict. c. 89); the Crown Debts and Judgments Act, 1860 (23 & 24 Vict. c. 115); and the Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 167.

CHAPTER XV.

WILLS.

I. Will—differing from instruments *inter vivos*.

THE modes of assurance previously considered have been by instruments designed to give effect to some transaction "*inter vivos*," between living parties. There remains to be considered another mode—namely, devise by Will. The former modes of assurance operate immediately upon their completion; but a Will may be revoked down to the very hour of the testator's death, provided mental competency remains; and, as it takes effect only from his death, it operates only on the property which he owns at his death (*a*).

In the strictest technical sense, the terms "will" and "devise" are applied to real estate; and the terms "testament," "bequest," and "legacy," to personal estate; but the terms "will," "testator," and "testamentary," are commonly used with reference to either species of property (*b*).

Codicil.

Besides a will, there is an instrument of testamentary disposition termed a Codicil. Blackstone says (*c*):—

> "A Codicil, *codicillus*, a little book or writing, is a supplement to a will; or an addition made by the testator, and annexed to, and to be taken as part of, a testament: being for its explanation, or alteration, or to make some addition to, or else some subtraction from, the former dispositions of the testator."

A codicil is occasionally written at the foot of and on the same sheet of paper as the will, but it is more generally written on a separate paper. The will and codicil together constitute the expression of the testator's intention, and the codicil is read together with and construed as part of the will itself.

Where a codicil affects the dispositions contained in a will or prior codicil, it is an established rule not to disturb the dispositions

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(*a*) In some cases a testator may be able, by exercising a power, to dispose of property that does not belong to him.

(*b*) Hayes & Jarman, 73, note (*e*); Shep. T. 400. As to the meaning of devise, see Co. Litt. 111 a; and *per* Lord Selborne, C., in *Holyland* v. *Lewin*, 26 Ch. Div., at p. 271.

(*c*) Vol. ii. 500.

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of the antecedent instrument further than is absolutely necessary in order to give effect to the subsequent codicil. Thus, where a testatrix, having by her will given her fortune to be divided between R. N. and A. K., by her codicil after reciting the death of A. K. desired her fortune might be divided between R. N. and T. K., "for the use of their children, and when they come of age to have settled upon them;" it was held that, R. N. having died without having had children, the absolute gift to him of a moiety under the will took effect; the original gift was affected only so far as was necessary in order to carry into effect the intention in his children's favour, and therefore, as he never had a child, was not in the result affected at all (*d*).

Codicils, as a rule, are objectionable except for simple purposes, such as the gift or revocation of a legacy, or the appointment of trustees or executors; for, independently of the risk of the codicil being lost, there is often much difficulty in fitting the provisions of the codicil into the trusts or limitations of the will. If larger changes are contemplated, a new will should be made.

Several wills.

Where a man leaves more than one will and the last of them contains no express revocation of the former wills, and does not dispose of all the property disposed of by them, all the wills taken together will be considered as "the will" (*e*).

History of devises of freeholds (*f*).

Previously to the Statute of Wills (*g*), the owner of lands had no power over them of direct disposition by will, except in some places by custom (*h*); but, while wills were not allowed, the practical power of devising lands was acquired indirectly by feoffments of the lands made to friends under instructions to hold them at the disposal by will or otherwise of the feoffor. And in such cases the will of the feoffor was enforced by the Court of Chancery as a declaration of the use. Thus, through the medium of uses, the power of devising was continually exercised in effect and reality. The Statute of Uses which we have above discussed (*i*), for a short time defeated this device,

(*d*) *Norman* v. *Kynaston*, 3 De G. F. & J. 29; and see 1 Jarman, 139, 140.

(*e*) *Lemage* v. *Goodban*, L. R. 1 P. & D. 57.

(*f*) As to the history of devises of copyholds, see *ante*, p. 328.

(*g*) 32 Hen. VIII. c. 1. See as to the history of wills, Hargrave's note (1) to Co. Litt. 111 b; 6 Cruise, Dig. 1; Digby, R. P., Ch. VIII., p. 375; P. & M. Hist. ii. 312.

(*h*) Co. Litt. 111 a.

(*i*) *Ante*, Ch. X., p. 268. See the Statute of Uses (27 Hen. VIII. c. 10) in Digby, R. P. 345. The statement in the text of the operation of the statute, though sufficient for the present purpose, is imperfect.

by conferring the legal estate (which was not devisable) upon the person that before had the use. In the same reign, however, after the short interval of five years, the power of devising was partially revived by the statute 32 Hen. VIII. c. 1 (commonly called the Statute of Wills, explained by 34 & 35 Hen. VIII. c. 5), power being thereby given to every person having "any lands or hereditaments holden in socage or in the nature of socage tenure," to devise them by his last will in writing: and power being given by the same statutes to devise two-thirds of lands holden by knight service. By 12 Car. II. c. 24, all the freehold land in the kingdom became socage, and therefore devisable.

Devise formerly passed only land belonging to testator at date of will.

It was held on the construction of the Statute of Wills that every devise of freehold land spoke from the date of the will, and passed only the land then belonging to the testator (*k*), or, in other words, that no freehold land acquired by a testator after the date of his will could pass by it. But the effect of a codicil duly executed so as to pass land, was to make the will speak from the date of the codicil and thus to enable it to pass land acquired between the date of the will and that of the codicil (*l*).

But freehold land acquired after the date of the will now passes by a general devise; for the Wills Act, 1837 (*m*) provides that (*n*) all the real estate of the testator which he shall be entitled to at law or in equity at the time of his death, and which, if left to be disposed of by law, would descend to the heir-at-law, or customary heir, may be disposed of by his will, including copyholds, estates *pur autre vie*, contingent executory or other future interests, and rights of entry for conditions broken and other rights of entry; and notwithstanding he may become entitled to the same subsequently to the execution of his will. And the will is to be construed with reference to the real and personal estate comprised in it, and to take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appear by the will (*o*).

Will speaks from death, as to property comprised in it.

(*k*) *Butler and Baker's Case*, 3 Rep. 30 b; *Buckenham* v. *Cook*, Holt, 248; 6 Cruise, Dig. 31; Hawk. Wills, 14. See the Statute of Wills set out in Digby, R. P. 385.

(*l*) *Acherley* v. *Vernon*, Com. Rep. 381; *Goodtitle* v. *Meredith*, 2 M. & S. 5.

(*m*) 7 Will. IV. & 1 Vict. c. 26, s. 3.

(*n*) As to the execution of a general power of appointment by will, see *ante*, p. 305.

(*o*) 7 Will. IV. & 1 Vict. c. 26, s. 24. See *In re Russell*, 19 Ch. Div. 432; *Re Portal and Lamb*, 30 Ch. Div. 50, at p. 55.

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Form.

Before the Statute of Frauds (*p*), a nuncupative will, *i.e.*, one made by word of mouth only, was sufficient to pass lands devisable by custom; but a will had to be in writing (not necessarily signed by the testator) in order to pass lands by virtue of the Statute of Wills. The Statute of Frauds, however, provided (*q*) that devises of lands "shall be in writing and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect."

Under Statute of Frauds.

It was held that this section did not apply to copyholds, probably on the ground that, as the land passed by the surrender and will together and not by the will alone, the gift of the copyholds was not a devise within the meaning of the Act; and that it did not apply to leaseholds for years. This section was repealed by the Wills Act, 1837 (*r*), which provided (*s*) that a will, which is defined so as to include a codicil (*t*), shall be signed at the foot or end thereof by the testator or other person under his direction, that such signature shall be made or acknowledged by the testator in the presence of two (*u*) or more witnesses present at the same time, and that such witnesses shall attest and subscribe the will in the presence of the testator. The Wills Act Amendment Act, 1852 (*x*), explained what was intended by a signature "at the foot or end" of the will.

Under Wills Act, 1837.

Attestation.

When the witnesses to the execution of a codicil signed their names on the back of the will, to which the codicil was attached by a pin, instead of attesting the signature of the testatrix on the paper itself; Sir James Hannen said:—

"The law does not require that the attestation should be in any particular place, provided that the evidence satisfies the Court that the witnesses in writing their names had the intention of attesting. But the attestation, if not on the same sheet of paper as the signature of the testator, must be on a paper physically connected with that sheet. No particular mode of affixing one piece of paper to another is prescribed by law, and I cannot say that the fastening of two sheets of paper together by a pin is an insufficient mode of connection, or that it is less

(*p*) 29 Car. II. c. 3.
(*q*) *Ib.* s. 5.
(*r*) 7 Will. IV. & 1 Vict. c. 26, s. 2.
(*s*) *Ib.* s. 9.
(*t*) *Ib.* s. 1.
(*u*) Under the Statute of Frauds, at least three were requisite.
(*x*) 15 & 16 Vict. c. 24. See *Margary* v. *Robinson*, 12 P. D. 8.

effectual than the lawyer's mode of fastening by a tape. Here I am satisfied by the evidence that the papers were connected together, and that in writing their names on the back of the original will, the witnesses intended to attest the signature of the testatrix at the foot of the codicil. That codicil, being duly executed, confirms the will in its altered state, and probate will go accordingly" (*y*).

Witnesses.

A witness who, or whose wife or husband, takes an interest under the will, is not a credible witness within the meaning of the Statute of Frauds, and therefore attestation by such a witness was formerly inoperative. The statute 25 Geo. II. c. 6, validated the attestation when there was a devise to the attesting witness, but invalidated the devise (*z*). The Wills Act, 1837, extended the provisions of 25 Geo. II. c. 6, to the wives and husbands of attesting witnesses (*a*).

Where a creditor, or the wife or husband of any creditor, is an attesting witness, the will is not thereby invalidated, although there be a charge of debts by the will in favour of such creditor (*b*); and an executor is not incompetent to prove the execution of a will, or its validity or invalidity (*c*).

Further, a will is not to be invalid by reason of an attesting witness being, at the time of execution or afterwards, incompetent to be admitted as witness to prove the execution (*d*).

Infants.

Before the Wills Act, 1837, came into operation, though an infant could not devise his land except by special custom, yet a boy of the age of 14 and a girl of the age of 12 could bequeath personal estate (*e*); but that Act provides (*f*) that no will made by a person under the age of 21 years shall be valid.

Married women.

The Act (*g*) also provides that "no will made by any married woman shall be valid, except such a will as might have been

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(*y*) *In the Goods of Braddock*, 1 P. D. 433. See also *In the Goods of Streatley*, [1891] P. 172; *In the Goods of Fuller*, [1892] P. 377; *Royle* v. *Harris*, [1895] P. 163. As to the case where the instrument actually executed by the testator comprises his will, but through fraud or inadvertence contains also something which is not his will, see *Rhodes* v. *Rhodes*, 7 App. Cas. 198; and *Morrell* v. *Morrell*, 7 P. D. 68.

(*z*) See *Emanuel* v. *Constable*, 3 Russ. 436.

(*a*) 7 Will. IV. & 1 Vict. c. 26, s. 15. The marriage, after attestation, of a devisee to the attesting witness does not affect the validity of the devise; *Thorpe* v. *Bestwick*, 6 Q. B. D. 311. It has been held that a provision that a solicitor trustee may charge profit costs is within s. 15, and therefore is void where he is an attesting witness; *Re Pooley*, 40 Ch. Div. 1.

(*b*) 7 Will. IV. & 1 Vict. c. 26, s. 16.

(*c*) *Ib.* s. 17.

(*d*) *Ib.* s. 14.

(*e*) 6 Cruise, Dig. 13.

(*f*) 7 Will. IV. & 1 Vict. c. 26, s. 7.

(*g*) *Ib.* s. 8.

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made by a married woman before the passing of this Act." We have therefore to enquire what power of testamentary disposition was vested in a married woman before the Act (*h*).

Where property belonged to her for her separate use, or where she had a power to appoint an equitable interest in property, she could dispose of the equitable, but not the legal, interest by her will. If freeholds were limited to such uses as she should appoint by will, she could by her will appoint the use, and the devisee taking the use under the will acquired the legal estate by the Statute of Uses. But she had no power to devise a legal interest in land (which, it will be remembered, could not vest in her solely during coverture), nor to devise an equitable interest not belonging to her for her separate use.

Though no extension was given to the testamentary power of a married woman by the Wills Act, 1837, some extended effect and operation was given to her testamentary appointment —namely, by the 24th and 27th sections. By s. 24, the will is to be construed with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the testator's death, unless a contrary intention appear from the will; and by s. 27 it is enacted that a general devise shall be construed to include any real estate which the testator may have power to appoint in any manner he may think proper, and shall operate as an execution of the power unless a contrary intention appear by the will (*i*). The effect of these sections on the execution of a power by the will of a married woman may be seen in the case of *Thomas* v. *Jones* (*k*), where a power of appointment was given to the survivor of three persons, D., J. and M. After the death of J., but while D. was living, M., being then under coverture, made her will. She survived D. and died in the lifetime of her husband without having republished her will. Lord Westbury, L.C., in giving judgment (*l*), said:—

"The objection of the appellants is founded on the 8th section of the statute, and may be thus stated:—The statute cannot be applied to render valid any devise contained in the will of a married woman,

(*h*) See *ante*, pp. 122, 125.

(*i*) *Post*, p. 409.

(*k*) 1 D. J. & S. 63, at p. 80.

(*l*) The L.C. went so fully into the question of the testamentary capacity of a married woman, and the effect thereon of the Wills Act, 1837, that the judgment is here given *in extenso*. See also *Willock* v. *Noble*, L. R. 8 Ch. 778; 7 H. L. 580.

which would not have been valid before the Act. But the will of Margaretta Nicholl, if made before the statute, would not have been valid as an appointment of the estate in question. Therefore, say the appellants, the Court cannot apply to this will the beneficial principles and rules of construction which are introduced by the 24th and 27th sections of the Act, and which are necessary to render the will a valid appointment. In other words, the plaintiffs contend that the application to this will of the 24th section of the statute, thereby giving a subsequent date to the will, is to confer a testamentary capacity which would not otherwise exist, and that this is forbidden by the 8th section. They insist that by applying the statute you make the will of a *feme covert* include that which, but for the statute, it would not; you enlarge her capacity, and make her will valid as to property of which, without the statute, it would not be a valid disposition. It is obvious that the result of this reasoning would exclude all wills of married women from the benefit of the provisions of the Act, wherever, by virtue of its enactment, such wills would receive a more extended operation. Such could hardly have been the intention of the Legislature. We may perhaps ascertain the meaning of the 8th section by adverting to the state of the law at the time of the introduction of the Act, and observing the manner in which the Act is constructed. By the law, as it stood at the time when the Act was passed, an infant might make a valid will of personal estate, but a married woman had no testamentary capacity except by virtue of a delegated authority. By means of a power or under a trust, as in the case of separate estate, a married woman might, by a writing in the nature of a will, dispose of real or personal estate, and with the licence and consent of her husband she might make a will, properly so called, of personal property. It was the intention of the Legislature by the new statute to render infants absolutely incapable of making a will; but it has, I think, preserved the testamentary status of married women exactly as it stood under the existing law. Therefore, the married woman's devise of real estate must still be made by means of a trust or power created for the purpose, and her capacity to bequeath personal estate must still be derived from the licence and authority of her husband. A distinction exists between the testamentary power of a *feme covert* and the effect and operation of her testamentary appointment. No greater testamentary power is to be obtained from the Act than would otherwise have existed. But an effect and operation may be given under the statute to a testamentary instrument executed by a married woman, which may make that instrument a valid exercise of an existing testamentary power, which before the statute it would not have been held to be. To render, however, the will of Margaretta, made in 1838, a valid appointment by way of devise of the estates in question under the statute, it is still necessary that Margaretta should have had at the time of her decease full power and right to make such a testamentary appointment without the aid of the statute. This she undoubtedly had, and her will, by being made to speak at the time of her death, still depends for its operation on the extent of her then existing testamentary authority. It seems to me, therefore, that the meaning of the 8th section may be correctly given by this paraphrase—No married woman shall acquire under this statute any greater testamentary right or power than married women are now

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capable of possessing by the existing law. In short, the legal testamentary status of a *feme covert* is to remain the same. And this is confirmed by observing the manner of the construction of the Act. First, the word 'will' is made to include appointments by will, or by writing in the nature of a will, in exercise of a power. And next, the third section is so worded as to give the most extensive testamentary power to every person, which word would include infants and married women, and render them as competent as any other persons but for the effect of the 7th and 8th sections. By the 7th section the infant is absolutely disqualified. By the 8th section, the legal position of the *feme covert* is to remain as before. Personally, she acquires no enlarged capacity from the statute, although her testamentary instrument or will, when made, may have the benefit of more liberal rules of interpretation. But the appointment and the will are still to be confined within the limits of the authority of the maker, existing at the time of the death. It is not, however, necessary that the authority should exist at the time of the execution of the instrument if it be afterwards acquired, and be subsisting at the time of the death of the testatrix. Such appears to me to be the meaning of the language of the Act, and to have been the intention and policy of the law. I have no difficulty in holding that by virtue of the 24th section the will of Margaretta is to be read and applied as if it had been executed immediately before her decease, and that under the 27th section the general devise contained in the will, so being considered to have been re-executed, is a good execution of the power of appointment given to the survivor" (*m*).

Married Women's Property Act, 1882.

Under the Married Women's Property Act, 1882 (*n*), a married woman is, after 1882, in accordance with the provisions of that Act, capable of disposing by will of any real or personal property as her separate property, in the same manner as if she were a *feme sole;* and every woman married after 1882 is entitled to dispose of in manner aforesaid all property which shall belong to her at marriage, or shall be acquired by or devolve upon her after marriage; and every woman married before 1883 is entitled to dispose of in manner aforesaid as her separate property all property, her title (*o*) to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after 1882. This power of disposition of a married woman is, however, subject to the provisions of any settlement made before or after marriage: and it was held to apply only to property to

(*m*) It seems therefore that a general power to appoint by will, given to the survivor of several persons, may be well exercised before he becomes the survivor; but it is doubtful whether this applies to special powers: see Farw. Pow. 158, 159; *Re Blackburn*, 43 Ch. Div. 75.

(*n*) 45 & 46 Vict. c. 75, ss. 1, 2, 5, and 19.

(*o*) The date at which the title was acquired, not the date at which the property falls into possession, is the date referred to; see the cases collected in W. B. & C., p. 258.

which she became entitled during coverture, and therefore that her will made during coverture was not operative on property which she did not acquire until after the coverture was at an end (*p*). This decision, however, has been rendered obsolete by the Married Women's Property Act, 1893 (*q*).

Lunatics, &c.

The Wills Act, 1837, did not alter the prior law that a person not of a sound disposing mind, whether from idiotcy, insanity, or other cause, is incompetent to make a will (*r*).

Lapse.

Two exceptions.

With two exceptions made by the Wills Act, 1837 (*s*), in every case of testamentary disposition the law implies the condition that the devisee shall survive the testator; otherwise the gift in his favour will fail, or, as it is termed, "lapse." Lapse is not prevented by the land being given to the devisee "and his heirs," which are but words of limitation. But, by the 32nd section, if a person to whom real estate has been devised for an estate tail, or *quasi*-entail, dies in the lifetime of the testator, leaving issue, who would be inheritable under the entail, and any such issue are living at the testator's death, the devise does not lapse, but takes effect as if that person had died immediately after the testator, unless a contrary intention appears by the will. The 33rd section provides that where a person being a child or other issue of the testator, to whom any real or personal estate has been devised or bequeathed for an estate or interest not determinable at or before his or her death, dies in the lifetime of the testator leaving issue living at the testator's death: the gift shall not lapse, but shall take effect as if such person had died immediately after the testator, unless a contrary intention appear by the will. It should be observed that neither section substitutes the issue for the deceased devisee; but the 32nd section makes the subject-matter of the devise descend as if the intended donee had actually been the donee in tail; the 33rd section makes the subject-matter of the devise the absolute property of the deceased devisee, and as such it will pass by his will, or descend from him as purchaser, notwithstanding that he died before the testator.

Devise of estate tail.

Devise to issue of testator.

Gift to class.

The 33rd section does not apply to gifts to classes, for the class being ascertained, where the gift is immediate, at the testator's

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(*p*) *Re Price, Stafford* v. *Stafford*, 28 Ch. Div. 709.

(*q*) 56 & 57 Vict. c. 63, s. 3; see *In re Wylie*, [1895] 2 Ch. 116.

(*r*) *Smith* v. *Tebbitt*, L. R. 1 P. & D. 398.

(*s*) 7 Will. IV. & 1 Vict. c. 26, ss. 32 and 33.

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death, and where the gift is not immediate, at some subsequent time, there is no gift to the child dying before the testator, as he is in neither case a member of the class, and so no lapse (*t*); nor does it apply to gifts under a special power of appointment, as a power to appoint to children, so as to prevent a lapse upon the death of an appointee. In such a case the property goes to the persons entitled in default of appointment, not by virtue of the intention of the donee of the power, who has no control over the property, but by virtue of the direction of the donor (*u*). But it does apply to gifts under a general power of appointment, although there is a gift over in default of appointment (*x*).

Residuary devise.

Unless there be a residuary devise, lapsed devises go to the heir-at-law; and, in the like case, the heir is entitled to lapsed gifts of the proceeds of real estate directed to be converted (*y*); if the failure of the gifts is total, he takes them as realty (*z*); if partial, as personalty (*a*).

In wills made before 1838, a residuary devise did not include a devise that lapsed (*b*); but probably it did include a devise which was void *ab initio* owing to the death of the devisee before the date of the will (*c*). The rule as to lapsed devises was reversed as to wills made or republished after 1837 by the Wills Act, 1837, which provided (*d*) that—

> S. 25. "Unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law, or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will."

Revocation (*e*).

Every testamentary disposition is liable to be revoked by the testator. This may be effected in three different manners:—

(*t*) 4 Dav. Prec. 42, 341; see *Dimond* v. *Bostock*, L. R. 10 Ch. 358; *Re Coleman and Jarrom*, 4 Ch. Div. 165; *Re Harvey*, [1893] 1 Ch. 567.

(*u*) See *per* Shadwell, V.-C., in *Griffiths* v. *Gale*, 12 Sim. 359. And see *Holyland* v. *Lewin*, 26 Ch. Div. 266.

(*x*) See *per* Wood, V.-C., in *Eccles* v. *Cheyne*, 2 K. & J. 676; and Tudor, L. C. R. P. 916, notes to *Elliot* v. *Davenport*.

(*y*) *Ackroyd* v. *Smithson*, 1 W. & T. 1027; *Court* v. *Buckland*, 1 Ch. Div., at 610; and 1 Jarman, 587.

(*z*) *Smith* v. *Claxton*, 4 Mad. 484.

(*a*) *Jessopp* v. *Watson*, 1 My. & K. 665; and *Smith* v. *Claxton*, 4 Mad. 484.

(*b*) *Wright* v. *Horne*, 8 Mod. 225, note (*c*).

(*c*) Hawk. Wills, 44, citing *Doe* d. *Stewart* v. *Sheffield*. But the point is open to doubt; 1 Jarman, 610, note (*c*).

(*d*) 7 Will. IV. & 1 Vict. c. 26, s. 25.

(*e*) See Theob. Wills, Ch. VI., p. 35.

(1) By a provision in a subsequent codicil or will expressly revoking the previous disposition; (2) by an inconsistent disposition contained in a subsequent will or codicil (*f*); and (3) by wholly revoking the instrument containing the disposition.

Inconsistent dispositions.

If dispositions which are apparently inconsistent occur in the same will, the Court will, if possible, endeavour to reconcile them (*g*).

For example, if the same property is given to different persons in different parts of the same will, they take as joint tenants or tenants in common (*h*). If land is given to one person without, and to another person with, words of limitation, the latter will take a fee in remainder (*i*). If immediate estates in fee and in tail, or in fee and for life, are given in the same lands, the devise in fee will be held to be a remainder, even if it precedes the devise of the particular estate (*k*). If the clauses are wholly irreconcilable, the latter prevails (*l*).

The will and codicil must, if possible, be construed together. If the disposition in the codicil is inconsistent with that in the will, it must prevail; but it is an established rule that the dispositions made in the codicil are not to disturb those in the will further than is necessary for the purpose of giving effect to the intentions expressed in the codicil (*m*).

Express revocation.

Under the Statute of Frauds (*n*) there were three express methods of revoking a will of land:—

First, by a subsequent will or codicil, duly executed so as to pass land, containing an express clause revoking former wills; *Second*, by a writing declaring the intention of revoking the will, signed by the testator in the presence of three witnesses, who need not subscribe in the presence of the testator; *Third*, by the testator, or some person in his presence, and by his express directions, cancelling the will; *i.e.*, obliterating or defacing the signature of the testator, or burning, tearing, or otherwise

Cancellation.

(*f*) Theob. Wills, 614.

(*g*) See Theob. Wills, 617.

(*h*) See the authorities collected in the note to *Paramour* v. *Yardley*, Plowd., at 541. But this does not apply to a case of will and codicil; *Evans* v. *Evans*, 17 Sim. 107.

(*i*) *Gravenor* v. *Watkins*, L. R. 6 C. P. 500.

(*k*) *Wallop* v. *Derby*, Yelv. 209.

(*l*) This rule was spoken of as "a mere rule of thumb," by Jessel, M.R., in *Re Bywater*, 18 Ch. Div., at pp. 19, 20.

(*m*) *Per* Lord St. Leonards, *Young* v. *Hassard*, 1 Dr. & War., at 644.

(*n*) 29 Car. II. c. 3, s. 6, on which see 6 Cruise, Dig., Ch. VI., p. 73.

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destroying, the will. It has been pointed out (*o*) that cancellation is in itself an ambiguous act. A man may throw his will into the fire, believing it to be another document; this would not be sufficient to revoke the will. Cancellation to be effective must be done with the intention of revoking the will.

Implied revocation—Marriage.

Revocation might also be implied owing to the alteration of the testator's circumstances, the most common case of which was marriage and the birth of a child (who might be posthumous) (*p*), but neither of these events alone (*q*) operated as a revocation.

Ademption.

Any conveyance to a stranger of the land devised, even if it was reconveyed to the testator, or even if the stranger stood seised to the use of the testator and his heirs by the conveyance itself, operated as a revocation of the devise, because, by the alienation, the testator ceased to "have" the lands, so that they could not pass by his will (*r*). The rule was the same if the testator was entitled in equity only (*s*); but it did not apply to a partition where the conveyance merely assured to the testator an estate in the allotted lands precisely corresponding with that which he previously had in his undivided share (*t*). Nor did it apply to a conveyance by way of mortgage (*u*), or in trust for sale for the payment of debts generally (*x*). But if the partition or mortgage deed did not stop with effecting the partition or mortgage, but modified the ulterior ownership, it revoked the devise (*y*).

Revocation under the Wills Act, 1837.

Since 1837 the revocation of wills and codicils depends on the provisions of the Wills Act, 1837 (*z*), which, after providing (*a*) for revocation by marriage (which case is dealt with below) enacts that:—

(*o*) *Per* Lord Mansfield, *Burtenshaw* v. *Gilbert*, 1 Cowp., at p. 52. See 6 Cruise, Dig. 83.

(*p*) 6 Cruise, Dig. 89, 90.

(*q*) 6 Cruise, Dig., Ch. VI., p. 91 (s. 54). There were some exceptions to the rule, which are stated in 7 Byth. & Jarm. Rob. 376, note. In the case of a woman, a will made before marriage was revoked by her marriage, but if she survived her husband, the will was revived; *Forse and Hembling's Case*, 4 Rep. 60 b; 6 Cruise, Dig. 92 (s. 57); see also *post*, p. 404.

(*r*) *Burgoine* v. *Fox*, 1 Atk. 575; *Darley* v. *Darley*, 3 Wils. 6; 6 Cruise, Dig. 93.

(*s*) *Earl of Lincoln's Case*, Show. Par. Ca. 154; S. C. 1 Eq. Ca. Ab. 411, pl. 11.

(*t*) *Luther* v. *Kirby*, cited 3 P. Wms. 170.

(*u*) *Hall* v. *Dunch*, 2 Ch. Rep. 154.

(*x*) *Vernon* v. *Jones*, 2 Vern. 243.

(*y*) *Titner* v. *Titner*, cited in 1 Wils. 309; *Harmood* v. *Oglander*, 6 Ves. 199. See the cases collected in 11 Byth. & Jarm., 3rd ed., at 107, 4th ed., vol. viii., p. 385.

(*z*) 7 Will. IV. & 1 Vict. c. 26.

(*a*) *Ib.* s. 18.

(S. 20.) "No will or codicil, or any part thereof shall be revoked otherwise than as aforesaid(*b*), or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same, by the testator, or by some person in his presence, and by his direction, with the intention of revoking the same."

"Last will."

It should be observed that the expression "this is my *last* will" does not operate as the revocation of a prior will (*c*), but it would be otherwise if the words were "last and only."

Destruction of will.

The following case (*d*) shows when a will is not to be considered "otherwise destroyed" within s. 20, so as to be revoked:—

The will and codicils were, at the testator's death, found upon the kitchen table. The testator had drawn a pen through the lines or some part of the will, leaving the words perfectly legible, and had written on the back, "all these are revoked." A housekeeper, who had been nine years with the testator, and left in January, 1876, stated that she had heard the testator speak about his wills, and say he had made two or three, but that he had cancelled them, and they were good for nothing, and that the testator had in her presence taken up this will and thrown it among a heap of waste paper on the floor. The housemaid deposed that she had first seen the document about eleven years ago in the testator's sitting-room, under the cushion on the sofa. That about seven or eight years ago the testator kicked it into a corner of the sitting-room among a quantity of other papers, and that she took it out of the sitting-room, where it was lying by the coal-box, along with other scraps of paper, and took it into the kitchen, where she put it on the table. Then it was sometimes on the table, sometimes on the kitchen window, and sometimes on a chair, just where she chose to put it, but the testator never asked for it, nor was it produced to him again. The Judge, being of opinion that there was no evidence of revocation within the 20th section of the Wills Act, directed the jury to find a verdict for the plaintiff. The principal defendants excepted to this ruling in order to bring the case before the Court of Appeal.

The judgment on appeal was delivered by James, L.J., who said:—

"We cannot allow the appeal in this case. It is quite clear that a symbolical burning will not do, a symbolical tearing will not do, nor will a symbolical destruction. There must be the act as well as the

(*b*) *I.e.*, by marriage.

(*c*) *Re De La Saussaye*, L. R. 3 P. & D. 42; *Re Pechell*, *ib.* 153; *Freeman* v. *Freeman*, 5 De G. M. & G. 704. It should be noted that a general clause of revocation in a will revokes a prior testamentary appointment: *Sotheran* v. *Denny*, 20 Ch. Div. 99.

(*d*) *Cheese* v. *Lovejoy*, 2 P. D. 251; and see *Hellier* v. *Hellier*, 9 P. D. 237.

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intention. As it was put by Dr. Deane in the Court below, 'All the destroying in the world without intention would not revoke a will, nor all the intention in the world without destroying: there must be the two."

Loss or destruction.

Where a will is shown to have been in the custody of a testator, and it is not found at his death, the presumption, in the absence of evidence to the contrary, is that the testator himself destroyed it (*e*). But that presumption may be rebutted: and if a will be lost or destroyed without the intention of revoking it, and the substance of it can be ascertained by means of the original instructions, or by a copy of the will, or by the recollection of persons who heard it read over, probate will be granted of a paper embodying such substance (*f*). The will of Lord St. Leonards was not forthcoming, though eight codicils to it were; there being no evidence of an intention to revoke the will, the Court, mainly on the evidence and recollection of the testator's daughter, Miss Sugden, pronounced for the validity of the will and codicils (*g*).

Revocation by marriage.

A will is also revoked by the marriage of the testator, except a will made under a power of appointment, when the real or personal estate thereby appointed would not, in default of such appointment, pass to the heir, customary heir, executor, or administrator, or the person entitled as next of kin under the Statute of Distributions, of the testator (*h*).

But no will is revoked by any presumption of intention from alteration of circumstances (*i*); and no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will is revoked, prevents the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death (*k*).

(*e*) *Per* Sir J. Hannen, *Sugden* v. *St. Leonards*, 1 P. D., at p. 195.

(*f*) Hayes & Jarman, 35.

(*g*) *Sugden* v. *Lord St. Leonards*, 1 P. D. 154. See the observations on this case in *Woodward* v. *Goulstone*, 11 App. Cas. 469, where Lord Herschell, L.C., observed that "to support a will propounded, when it is proved by parol evidence only, that evidence ought to be of extreme cogency, and such as to satisfy one beyond all reasonable doubt that there is really before one substantially the testamentary intention of the testator" (*ib.* p. 475); and see *Harris* v. *Knight*, 15 P. D. 170.

(*h*) Wills Act, 1837 (7 Will. IV. & 1 Vict. c. 26), s. 18. On the construction of this section, see *Re Fitzroy*, 1 Sw. & Tr. 133; *Re Fenwick*, L. R. 1 P. & D. 319; *Vaughan* v. *Vanderstegen*, 2 Drew. 165; *In re Russell*, 15 P. D. 111.

(*i*) 7 Will. IV. & 1 Vict. c. 26, s. 19.

(*k*) *Ib.* s. 23.

Obliteration—interlineation—alteration.

No obliteration, interlineation, or other alteration made in any will after the execution thereof, has any effect (except so far as the words or effect of the will before such alteration shall not be apparent) unless such alteration be executed in like manner as required by the Act for the execution of the will (*l*). And, contrary to the case of a deed (for a deed cannot be altered after it is executed without fraud or wrong, and the presumption is against fraud and wrong (*m*)), it will generally be presumed that an alteration appearing on the face of a will was made after execution (*n*). But alterations made prior to execution will be read as part of the will, if identified in any way provided by the 21st section of the Wills Act, 1837.

Revival.

No will, or any codicil, or any part thereof, once revoked, can be revived otherwise than by re-execution (generally, though incorrectly, called republication), or by a duly executed codicil showing an intention to revive the same. And it is further provided (*o*) that:—

> "When any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown."

Mistaken reference to revoked will.

Where a testator made a will, and afterwards another, which, by implication, revoked the earlier will, and subsequently, by the terms of a duly executed codicil, by mistake referred to the earlier instead of the later will; it was held that the codicil revived the earlier will, and that, as it did not revoke the later will, all three documents must be admitted to probate (*p*).

What passes by the devise.

The principal questions that arise on the interpretation of a devise are the following:—(1) What passes by the devise? and (2) What estate is given to the devisee? It need hardly be said that these are questions of the utmost difficulty, and that we can within the necessary limits of this work do little more than indicate the nature of them.

(*l*) 7 Will. IV. & 1 Vict. c. 26, s. 21. As to when obliterated words are "apparent," see *Finch* v. *Combe*, [1894] P. 191.

(*m*) Co. Litt. 225 b; see Elph. N. & C. Interp. 17, as to alterations in deeds.

(*n*) See Hayes & Jarman, 37; Theob. Wills, 33.

(*o*) 7 Will. IV. & 1 Vict. c. 26, s. 22.

(*p*) *In the Goods of Stedham*, 6 P. D. 205; and see *In the Goods of Dyke*, *ib.* 207. In both cases there was not a mere mistake as to date in the reference to the will, but the codicil was constructed with a view to the substance of the provisions in the will referred to.

"Lands," "tenements," "hereditaments."

Prior to the Act supplying a surrender of copyholds to the use of the will (*q*), if a testator had only an equitable estate (*r*) in copyholds, it passed by a devise of "lands," "lands and tenements," or, "lands, tenements, and hereditaments;" and, after the passing of that Act, the legal estate passed by the same words (*s*).

In wills made before 1838, leaseholds for years did not pass by these words, unless the testator had no freeholds (*t*), or the leaseholds were intermixed and enjoyed with the freeholds (*u*).

This rule is altered by the 26th section of the Wills Act, 1837 (7 Will. IV. & 1 Vict. c. 26), which provides that:—

> "A devise of the land of the testator, or of the land of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a customary, copyhold, or leasehold estate if the testator had no freehold estate which could be described by it, shall be construed to include the customary, copyhold, and leasehold estates of the testator, or his customary, copyhold and leasehold estates, or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will."

"Real estate."

The term "real estate" is properly applicable to copyholds but not to leaseholds. It follows that if before 55 Geo. III. c. 192, the testator had only an equitable estate in copyholds, it passed by a devise of "real estate," and that after the passing of that Act, the legal estate passed by the same words.

On the other hand, leaseholds for years will not pass by a devise of "real estate," either before or after the Wills Act, 1837 (*x*), unless the testator had no freeholds, or he describes the "real estate" by reference to locality, and had no freeholds at the place (*y*), or he uses other language showing that he intended to include the leaseholds (*z*).

(*q*) 55 Geo. III. c. 192; *ante*, p. 328.

(*r*) *Car* v. *Ellison*, 3 Atk. 73.

(*s*) *Doe* d. *Clarke* v. *Ludlam*, 7 Bing. 275.

(*t*) *Rose* v. *Bartlett*, Cro. Car. 293.

(*u*) *Hobson* v. *Blackburn*, 1 My. & K. 571.

(*x*) 7 Will. IV. & 1 Vict. c. 26. *Butler* v. *Butler*, 28 Ch. Div. 66, where the prior cases are discussed.

(*y*) *Day* v. *Trig*, 1 P. W. 286; *Doe* d. *Dunning* v. *Cranstoun*, 7 M. & W. 11; *Gully* v. *Davis*, L. R. 10 Eq. 562. In each of these cases the words were "freehold land," but the reasoning applies to the words "real estate." See also *Wilson* v. *Eden*, 11 Beav. 237; 5 Ex. 752; 14 Beav. 317; 18 Q. B. 474; 16 Beav. 153.

(*z*) *Swift* v. *Swift*, 1 De G. F. & J. 160.

"Rents and profits"—"income."

A devise of the rents and profits (*a*) or of the income (*b*) of lands passes the lands both at law and in equity; and since 1837 it passes, but before 1838 it did not pass (*c*) the fee simple.

We have already pointed out that in wills since 1837 a general devise operates as the execution of a general power (*d*).

Trust and mortgage estates.

Before 1882 estates, vested in a man by way of mortgage or as trustee, passed under a general devise of real estate, unless it could "be collected from expressions used in the will, or purposes or objects of the testator, that he did not mean they should pass" (*e*); but a general devise would not pass a trust estate, or a mortgaged estate vested in a trustee, if any intention appeared to treat the property comprised therein in a manner inconsistent with the nature of trust property (*f*). Thus, where a testator charged the property comprised in a general devise with debts, or with debts and legacies or with legacies only, the legal estate in property vested in the testator as trustee or as mortgagee would not pass under such general devise (*g*); for his intention was taken to be, to pass by the devise only estates which he had power to subject to such charges, that is to say, those which were, equitably as well as legally, his own (*h*).

By the Conveyancing and Law of Property Act, 1881 (*i*), any estate or interest vested on any trust or by way of mortgage in any person solely, on his death (after 1881), notwithstanding any testamentary disposition, devolves to and vests in his personal representatives in the same manner as if it were a chattel real.

This section was repealed "as to land of copyhold or customary tenure vested in the tenant on the Court Rolls of any manor" by the Copyhold Act, 1887 (*k*), which section is now repealed and replaced by a similar provision in the Copyhold Act, 1894 (*l*).

Execution of trust by devisee.

The further question arose, how far the devise of a trust estate would do more than pass the legal estate, in other words,

(*a*) Co. Litt. 4 b.

(*b*) *Mannox* v. *Greener*, L. R. 14 Eq. 456.

(*c*) *Plenty* v. *West*, 6 C. B. 201; *Mannox* v. *Greener*, L. R. 14 Eq. 456.

(*d*) *Ante*, p. 305; and see *post*, p. 409.

(*e*) 1803, *per* Lord Eldon, in *Lord Braybroke* v. *Inskip*, Tudor, L. C. R. P. 990.

(*f*) *Ib.* p. 993, quoting the authorities.

(*g*) See *Re Bellis*, 5 Ch. Div. 504.

(*h*) *Doe* v. *Lightfoot*, 8 M. & W. 553.

(*i*) 44 & 45 Vict. c. 41, s. 30.

(*k*) 50 & 51 Vict. c. 73, s. 45. It is doubtful whether the provisions of this section applied to cases of death before the passing of this Act, *i.e.*, 16th Sept., 1887; see *Re Mills*, 37 Ch. Div. 312; 40 Ch. Div. 14.

(*l*) 57 & 58 Vict. c. 46, s. 88.

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how far the devisee could execute the trust; and it was held to depend on the intention of the author of the trust, to be collected from the terms in which the instrument was expressed (*m*). The question turned on whether a personal confidence was reposed in the persons named.

In the case of persons dying after 1881, the Conveyancing and Law of Property Act, 1881 (*n*), in continuation of the above enactment, gives the like powers to the deceased's personal representatives to dispose of and deal with the trust and mortgage estates as if the same were a chattel real, with all the like incidents, but subject to all the like rights, equities, and obligations; and for such purposes the deceased's personal representatives are to be deemed his heirs and assigns within the meaning of all trusts and powers.

It will be observed that this section does not enable the personal representatives to execute the trusts in all cases; it vests the trust property in them and only enables them to execute the trust in cases where the heirs or the assigns of the deceased trustee would have been able to do so if the Act had not been passed.

Execution of power of appointment by will.

Primâ facie a gift not expressed to be made by virtue of a power, relates to the testator's own property only, not to that over which he has a power (*o*).

The rule is subject to two exceptions: *first*, if the property the subject of the power be described sufficiently to show that the testator intended to dispose of it, the gift operates as an execution of the power; but there must be clear words of reference to the property (*p*).

General devise, before Wills Act, 1837.

Second, if, before 1838, a testator made a general devise of "land" or "real estate," and had no land at the date of his will, the devise passed land over which he had only a power, whether general or special (so far, in the case of a special power, as the devisees were objects of the power) (*q*). The reason of this

(*m*) Lewin, p. 242; *In re Burtt*, 1 Drew. 319. See *Osborne to Rewlett*, 13 Ch. Div. 774; *Re Morton and Hallett*, 15 Ch. Div. 143; Dart, V. & P. 682.

(*n*) 44 & 45 Vict. c. 41, s. 30.

(*o*) *Clerc's Case*, 6 Rep. 17 b; *Webb* v. *Honnor*, 1 J. & W. 352.

(*p*) *Re David's Trusts*, 1 John. 495; *Innes* v. *Sayer*, 3 Mac. & G. 606; *Lownds* v. *Lownds*, 1 Y. & J. 445.

(*q*) *Denn* v. *Roake*, 6 Bing. 475; Farw. Pow. 176, 227; Theob. Wills, 195; Hawk. Wills, 25. The rule even applied to special powers; *Wallop* v. *Portsmouth*, Sugd. Pow. 916.

exception is that, as the will could not pass land acquired after its execution, either the land subject to the power must have passed or the devise have been nugatory. But such a devise after 1837 does not exercise a special power (*r*), as it is possible that the testator may after the date of the will acquire land to which the words would be applicable. And the rule is altered as to general powers by the Wills Act, 1837, which provides (*s*) that after 1837 general devises of the real estate of the testator or of the real estate of the testator described in a general manner, "shall be construed to include any real estate of the testator, or any real estate to which such description shall extend (as the case may be), which the testator may have power to appoint in any manner he may think proper, and shall operate as an execution of such power (*t*), unless a contrary intention appears by the will."

After Wills Act, 1837.

In wills before 1838 a devise without words of limitation conferred an estate for life only on the devisee. This rule was subject to numerous exceptions (*u*), the most important of which was that, if the words did not denote the property itself but the *quantum* of interest that the testator had in the property, then the whole of such interest passed by the devise (*x*). The word "estate" is ambiguous; it may mean the land itself or the testator's interest in it. The latter construction is placed on it in a gift of "estate" or "estates," so that such a gift was sufficient to pass the fee simple or other the whole interest of the testator (*y*).

Devise without words of limitation.

It was also held that a gift without words of limitation was enlarged by the imposition of a pecuniary charge, however small, on the person of the devisee, or on the interest devised to him. But this was not the case if the devise was merely made "subject to" a charge (*z*). The reason for the rule appears to be that, as the devisee had to pay the money at all

Devise with charge.

(*r*) *Re Mills*, 34 Ch. 186; *Re Williams*, 42 Ch. Div. 93; Theob. Wills, 204.

(*s*) 7 Will. IV. & 1 Vict. c. 26, s. 27. See Theob. Wills, 197; *ante*, p. 305.

(*t*) A general devise of real estate will not *per se* operate as an exercise of a power of revocation and new appointments; *Re Bracc*, [1891] 2 Ch. 671.

(*u*) This subject is discussed in Hawk. Wills, 130; Theob. Wills, 338; and *ante*, p. 83.

(*x*) *Hogan* v. *Jackson*, Cowp. 306; *Bowen* v. *Lewis*, 9 App. Cas. 890.

(*y*) *Doe* d. *Burton* v. *White*, 1 Ex. 534; see *Hill* v. *Brown*, [1894] A. C. 125.

(*z*) *Doe* d. *Stevens* v. *Snelling*, 5 East, 87; *Doe* d. *Sams* v. *Garlick*, 14 M. & W. 698; *Burton* v. *Powers*, 3 K. & J. 170

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events, he might die before he could repay himself out of the estate, in which case he would be a loser by the devise if he did not take the fee (*a*).

Wills Act, 1837, s. 28.

The Wills Act, 1837, altered the rule as to wills made after 1837 by providing that:—

Devise without words of limitation construed to pass the fee.

(S. 28.) "Where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will."

Mr. Jarman (*b*) points out that:—

"The effect of the 28th section is not wholly to preclude, with respect to wills made or republished since the year 1837, the question whether an estate in fee will pass without words of limitation, but merely to reverse the [former] rule. Formerly, nothing more than an estate for life would pass by an indefinite devise, unless a contrary intention could be gathered from the context. Now, an estate in fee will pass by such a devise, 'unless a contrary intention shall appear by the will.' The *onus probandi* (so to speak), under the [present] law, lies on those who contend for the restricted construction."

"Issue;" whether word of limitation.

A devise to "A. and the heirs of his body" in wills (whether before or after the Wills Act, 1837), confers an estate tail on A. In devises, "issue" is *primâ facie* a word of limitation and equivalent to "heirs of the body" (*c*). A devise to "A. and his issue," or to "A. for life, with remainder to his issue," vests an estate tail in A. But the word "issue" may be a word of purchase; for example, where there is a gift to A. for life, with remainder to his issue as tenants in common, the issue take by purchase (*d*), and, in the case of a will after 1837, they take the fee simple. There are some few other cases in which the context shows that "issue" does not confer an estate tail on the first taker (*e*).

—"children;" whether word of limitation.

The words "children," "child" and "son" are sometimes used as words of limitation. Thus, a gift to A. and his "children," or "child," or "son," may confer an estate tail on A. (*f*).

In wills before 1838, a devise of an estate for life or in fee

(*a*) See Hargrave's note, Co. Litt. 9 b.
(*b*) 2 Jarman, 1135.
(*c*) *Roddy* v. *Fitzgerald*, 6 H. L. C. 823.
(*d*) *Montgomery* v. *Montgomery*, 3 Jo. & Lat. 47; Hawk. Wills, 193.
(*e*) See Hawk. Wills, 195, *et seq.*
(*f*) Hawk. Wills, 199; Theob. Wills, 344.

simple on A., followed by a gift over on general failure of his issue, confers an estate tail on A. (*g*).

Death without issue.

In wills before 1838, words referring to the death of a person without issue (whether the terms be "if he die without issue," "if he have no issue," "if he die without having issue," "if he die before he has any issue," "for want of issue," "in default of issue"), if unexplained by the context, are construed to mean an indefinite failure of issue, *i.e.*, a failure or extinction of issue at any time (*h*), and therefore to confer an estate tail.

There were two exceptions to the rule. Though the phrase "leaving no issue," when applied to realty, meant an indefinite failure of issue, yet in some cases the context showed that, when applied to personalty, it meant failure of issue at the death of the *propositus* (*i.e.*, the person whose issue are referred to).

The other exception to the rule was where a testator, having no issue at the time of making his will, devised property on failure or in default of his own issue, in which case it was considered that his object was simply to make the devise contingent on his leaving no issue surviving him (*i*). The questions arising on the application of the rule were of the utmost nicety, but they have been obviated as to wills after 1837 by the following provision of the Wills Act, 1837:—

7 Will. IV. & 1 Vict. c. 26, s. 29.

Words importing failure of issue to mean issue living at the death.

(S. 29.) "In any devise or bequest of real or personal estate the words 'die without issue,' or 'die without leaving issue,' or 'have no issue,' or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime, or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise: Provided, that this Act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age, or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue" (*k*).

Mr. Jarman says (*l*):—

"The result, then, of [this enactment] appears to be, that the words denoting a failure of issue refer to a failure at the death in every case,

(*g*) *Dansey* v. *Griffiths*, 4 M. & S. 61; *Blackborn* v. *Edgley*, 1 P. W. 600; *Machell* v. *Weeding*, 8 Sim. 4.

(*h*) See notes to *Forth* v. *Chapman*, in Tudor, L. C. R. P. 682.

(*i*) 2 Jarman, Ch. XLI., p. 1320.

(*k*) See *Re Ball*, 36 Ch. Div. 508.

(*l*) 2 Jarman, 1321. See as to the

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unless one of two points can be established:—First, that the words are referential to the objects of a prior estate or a preceding gift; or, secondly, that they are so clearly and explicitly used to denote a failure of issue at any time as to exclude the statutory rule of construction, which, it will be observed, only obtains where there is an ambiguity—*i.e.*, where the words may import either a failure of issue in the lifetime or at the death, or an indefinite failure of issue. If, therefore, a testator by a will made or republished since 1837, devise real estate to A. or to A. and his heirs, and if A. shall die and his issue shall fail at any time, then to B., A. will take an estate tail, as he formerly would have done without these special amplifying words, which exclude, beyond all question, the application of the enacted doctrine."

When trustees take the legal estate.

Two questions may arise where there is a devise to one person in trust for another:—*First*, does the devisee take the legal estate, or does the legal estate pass to the beneficiary? *Secondly*, supposing that the trustee takes the legal estate, what is the *quantum* of that estate?

The answer to the first question depends upon whether any active duties are imposed on the trustee; if they are, he takes the legal estate in order to enable him to perform those duties (*m*).

Thus a devise to trustees in trust to pay the profits to A., vests the legal estate in the trustees, because they cannot pay the profits till they have received them, and in order to take them they require the legal estate. On the other hand, a devise to trustees in trust to permit A. to receive the rents and profits, vests the legal estate in A.; for in this case there is no reason why the trustees should retain the legal estate, and the Statute of Uses produces its effect in shifting the legal estate to A. (*n*).

A devise in trust to "pay to or permit" A. to receive the rents and profits vests the legal estate in A., on the ground that, there being two inconsistent clauses, the latter ("to permit") must prevail (*o*).

Statute of Uses.

It has often been observed that, though the Statute of Uses (27 Hen. VIII. c. 10), having been passed before the Statute of

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restrictions imposed on such limitations by the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 10; *ante*, p. 289.

(*m*) See Tudor, L. C. R. P., notes to *Tyrrell's Case*, at p. 353.

(*n*) Hawk. Wills, 140; *Barker* v. *Greenwood*, 4 M. & W. 421. Where the devisees were also executors, a devise was held to vest the legal estate in them by reason of a direction that the testatrix's debts should be paid by her executors; *Re Brooke*, [1894] 1 Ch. 43.

(*o*) *Doe* d. *Leicester* v. *Biggs*, 2 Taunt. 109; see, however, *Re Lashmar*, *Moody* v. *Penfold*, [1891] 1 Ch. 258.

Wills (32 Hen. VIII. c. 1), does not of its own force apply to wills, yet it is sometimes used as a mode of construing wills, where it is obvious, from the words of the devise, that the testator had the statute in his mind, and that the form of the gift was framed by reference to the statute, and was intended to operate as if the statute applied to it; in other words, testators are at liberty to employ the machinery of the statute for the purpose of manifesting their intention (*p*).

Where the devise is for the separate use of a married woman, the legal estate vests in the trustees for her protection (*q*).

When trustees take fee simple.

In wills before 1838, the question whether the trustees took an estate in fee simple was often one of considerable difficulty (*r*). The rules, which were subject to numerous exceptions, were the following:—

1. If a devise was made to trustees without the word "heirs," on trusts which could not be performed without their taking the fee, they took it (*s*). For example, a devise unto and to the use of A. in trust for B. and his heirs, gave the legal fee to A.

2. If a devise was made to trustees, even with words of inheritance, they took only so much of the legal estate as was necessary to enable them to perform the trust (*t*). Thus if the devise was to trustees and their heirs in trust to pay the rents to A. during his life, and afterwards in trust for B., the trustees took the legal estate during A.'s life only.

3. If a devise was made to trustees without the word "heirs," on trust to raise a sum of money or debts or legacies out of the *annual* rents and profits, it was sometimes held that they took a term of years determinable when the purposes of the trust were satisfied (*u*). But this rule has been disapproved of (*x*), and it is doubtful how far it would be now followed.

4. If a devise was made to trustees "and their heirs" in trust to raise a sum of money, or debts or legacies, it was sometimes held that they took a fee simple determinable when the purposes

(*p*) *Per* Jessel, M.R., *Re Tanqueray-Willaume and Landau*, 20 Ch. Div. 465, at p. 478; *per* Chitty, J., *Re Brooke*, [1894] 1 Ch. 43, at p. 48.

(*q*) *Harton* v. *Harton*, 7 T. R. 652.

(*r*) See Tudor, L. C. R. P., notes to *Tyrrell's Case*, at p. 356; Lewin, Ch. XII.; Godefroi on Trusts (2nd ed.), Ch. I., pp. 19, *et seq.*; Theob. Wills, 360.

(*s*) *Gibson* v. *Montfort*, 1 Ves. Sen., at p. 491.

(*t*) *Doe* d. *Player* v. *Nicholls*, 1 B. & C. 336; *Watson* v. *Pearson*, 2 Ex. 581.

(*u*) *Cordall's Case*, Cro. Ell. 316; *Doe* d. *White* v. *Simpson*, 5 East, 162; *Ackland* v. *Lutley*, 9 Ad. & El. 879; 2 Man. & Gr. 973.

(*x*) *Collin* v. *McBean*, L. R. 1 Ch. 81.

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of the trust were satisfied (*y*), but it is doubtful if this construction would now be followed (*z*).

7 Will. IV. & 1 Vict. c. 26.

These rules do not apply to wills after 1837, owing to the following provisions of the Wills Act, 1837:—

No devise to trustees or executors, except for a term or a presentation to a church, shall pass a chattel interest.

S. 30. "Where any real estate (other than or not being a presentation to a Church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication.

Trustees under an unlimited devise where the trust may endure beyond the life of a person beneficially entitled for life to take the fee.

S. 31. "Where any real estate shall be devised to a trustee without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple, or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied."

These clauses have been the subject of much criticism. Mr. Jarman (*a*) says:—

"It is not easy to perceive why the provision regulating the estates of trustees should have been split into two sections, and still more difficult is it to give to each of those sections such a construction as will preserve it from collision with the other. The design of section 30 would seem to be simply to negative the construction which, in certain cases, gave to a trustee an undefined term of years, for it allows him to take an estate of freehold, or a definite term of years, either expressly or by implication; but section 31 takes a wider range, as it admits of neither of these exceptions, nor that of a devise of the next presentation to a Church. Its effect is to propound, in regard to wills made or republished since the year 1837, the following general rule of construction: that whenever real estate is devised to trustees (and it would seem to be immaterial whether the devise is to the trustees indefinitely, or to them and their heirs, or to them and their executors or administrators), for purposes requiring that they should have some estate, without any specification of the nature or duration of such estate, and the beneficial interest in the property is not devised to a person for life, or being so devised, the purposes of the trust may endure beyond the life of such person, the trustees take (not, as in *Carter* v. *Barnardiston*, 1 P. W. 505, an estate for years, or as in *Doe* v. *Simpson* (5 East, 162), an estate

(*y*) *Glover* v. *Monckton*, 3 Bing. 13. Hawk. Wills, 149.

(*z*) *Doe* d. *Davies* v. *Davies*, 1 Q. B. 430; *Blagrave* v. *Blagrave*, 4 Ex. 550

(*a*) 2 Jarman, 1165, 1166.

for life, with a superadded term for years, but) an estate in fee simple. The result, in short, is that trustees, whose estate is not expressly defined by the will, must, in every case, and whatever be the nature of the duty imposed on them, take either an estate for life or an estate in fee."

Again, Mr. Hawkins says (*b*) :—

"These sections have been described as obscure and even conflicting: their meaning, however, will be apprehended by observing that the 30th section, which speaks of a devise passing 'the fee simple or other the whole estate or interest of the testator,' relates to the quantity of estate to be taken by a trustee for the purposes of the trust; while the 31st section, which declares that a devise shall vest in trustees 'the fee simple or other the whole legal estate' in the premises devised, relates to the disposition of the legal estate not required for the purposes of the trust. The 30th section enacts, that in no case shall trustees or executors be held, for the purposes of the trust, to take an indefinite term of years; the 31st section enacts, that where the estate of the trustees is not expressly limited, they shall in all cases take either an estate determinable on the life of a person taking a beneficial life interest in the property, or the absolute legal estate in fee simple."

Executors.

A will is complete, as regards real estate, without the appointment of an Executor. The property vests directly in the devisee by the operation of the devise. When beneficial interests are created apart from legal ownership, the property is devised to trustees for the purpose. Most persons, however, who have realty to devise have likewise some personalty to bequeath, and it is usual in every will to appoint an executor or executors.

Debts.

We have in a previous chapter (*c*) discussed the liability of lands to the debts of their deceased owner.

Implied charge of debts.

Questions of some nicety have arisen as to what words create an implied charge of debts, and as to what is the effect of such a charge. Without discussing these questions in detail (*d*), we may state the rules following:—

(1) A mere direction by the testator "that his debts shall be paid" charges his real estate with them (*e*).

(2) A direction by the testator that his debts shall be paid "by his executors" charges only the real estate, if any, devised to them (*f*).

(*b*) Hawk. Wills. 156.

(*c*) *Ante*, Ch. IV., pp. 116, *et seq.*

(*d*) See Hawk. Wills, 282; Theob. Wills, 669.

(*e*) *Clifford* v. *Lewis*, 6 Mad. 33.

(*f*) *Cook* v. *Dawson*, 29 Beav. 123; 3 De G. F. & J. 127; *Re Tanqueray-Willaume and Landau*, 20 Ch. Div. 465. The rule was applied to the will of a married woman in *Re De Burgh-Lawson*, 41 Ch. Div. 568.

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(3) The charge of the real estate with debts does not of itself discharge the personal estate (*g*).

Executors' implied power of sale in payment of debts.

The question (*h*) whether, where the testator appointed executors, and also charged his real estate with payment of his debts, there was not thereby given to them by implication a power of sale to satisfy the debts, is one of considerable difficulty. The better opinion is that the executors took an equitable power of sale (*i*) and power to give receipts for the purchase money. In consequence, the following provisions were enacted by the Law of Property Amendment Act, 1859 (*k*) :—

22 & 23 Vict. c. 35.

Devisee in trust may raise money by sale, notwithstanding want of express power in the will.

S. 14. "Where, by any will which shall come into operation after the passing of this Act (*l*), the testator shall have charged his real estate, or any specific portion thereof, with the payment of his debts, or with the payment of any legacy or other specific sum of money, and shall have devised the estate so charged to any trustee or trustees for the whole of his estate or interest therein, and shall not have made any express provision for the raising of such debt, legacy, or sum of money out of such estate, it shall be lawful for the said devisee or devisees in trust, notwithstanding any trusts actually declared by the testator, to raise such debts, legacy, or money, as aforesaid, by a sale and absolute disposition by public auction or private contract of the said hereditaments or any part thereof, or by a mortgage of the same, or partly in one mode and partly in the other, and any deed or deeds of mortgage so executed may reserve such rate of interest, and fix such period or periods of repayment as the person or persons executing the same shall think proper (*m*).

Powers given by last section extended to survivors, devisees, &c.

S. 15. "The powers conferred by the last section shall extend to all and every person or persons in whom the estate devised shall, for the time being, be vested by survivorship, descent, or devise, or to any person or persons who may be appointed under any power in the will, or by the Court of Chancery, to succeed to the trusteeship vested in such devisee or devisees in trust as aforesaid (*n*).

Executors to have power of raising money, &c., where there is no sufficient devise.

S. 16. "If any testator, who shall have created such a charge as is described in the 14th section, shall not have devised the hereditaments charged as aforesaid in such terms as that his whole estate and interest therein shall become vested in any trustee or

(*g*) *Tait* v. *Northwick*, 4 Ves. 823; *Ancaster* v. *Mayer*, 1 Bro. C. C. 454; *Bootle* v. *Blundell*, 1 Mer. 193.

(*h*) See this discussed in Williams on Real Assets, 77; 2 Dav. Prec. i. 328, note; Dart, V. & P. 693; Farw. Pow. 79; Sugd. Pow. 121.

(*i*) *Forbes* v. *Peacock*, 1 Ph. 717; *Robinson* v. *Lowater*, 5 De G. M. & G. 272; *Doe* d. *Jones* v. *Hughes*, 6 Ex. 223.

(*k*) 22 & 23 Vict. c. 35.

(*l*) 13th August, 1859.

(*m*) See the Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 13, 20, replacing repealed provisions of the Conv. and Law of Prop. Act, 1881 (44 & 45 Vict. c. 41), ss. 35 and 36.

(*n*) See the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 22, replacing the Conv. and Law of Prop. Act, 1881 (44 & 45 Vict. c. 41), s. 38.

trustees, the executor or executors for the time being named in such will (if any) shall have the same or the like power of raising the said monies as is hereinbefore vested in the devisee or devisees in trust of the said hereditaments, and such power shall from time to time devolve to and become vested in the person or persons (if any) in whom the executorship (*o*) shall for the time being be vested; but any sale or mortgage under this Act shall operate only on the estate and interest, whether legal or equitable, of the testator, and shall not render it unnecessary to get in any outstanding subsisting legal estate.

Purchasers, &c., not bound to inquire as to powers.

S. 17. "Purchasers or mortgagees shall not be bound to inquire whether the powers conferred by sections 14, 15, and 16, of this Act, or either of them, shall have been duly and correctly exercised by the person or persons acting in virtue thereof (*p*).

Sections 14, 15, and 16, not to affect certain sales, &c., nor to extend to devisees in fee or in tail.

S. 18. "The provisions contained in sections 14, 15, and 16, shall not in any way prejudice or affect any sale or mortgage already made, or hereafter to be made, under or in pursuance of any will coming into operation before the passing of this Act; but the validity of any such sale or mortgage shall be ascertained and determined in all respects as if this Act had not passed; and the said several sections shall not extend to a devise to any person or persons in fee or in tail, or for the testator's whole estate and interest charged with debts or legacies, nor shall they affect the power of any such devisee or devisees to sell or mortgage as he or they may by law now do."

Charge of legacies by gift of "residue:" *Greville* v. *Browne.*

In the absence of express provisions legacies are to be paid out of the personal estate only. But it is an old and well-established rule that, if the testator gives legacies generally, and then gives the "residue" of his real and personal estate, that charges the legacies on the residuary real as well as the personal estate. The reason is that it is considered that the whole is one mass; that part of that mass is represented by legacies, and that what is afterwards given, is given *minus* what has been before given, and therefore given subject to the prior gift (*q*). But the legacies are still payable primarily out of the personalty, unless the testator directs them to be paid out of the mixed fund, in which case they are payable rateably out of realty and personalty (*r*).

(*o*) This does not apply to an administrator; *Re Clay and Tetley*, 16 Ch. Div. 3.

(*p*) Where executors in whom the legal fee is vested by the will are selling real estate charged with debts, a purchaser is not bound or entitled to inquire whether debts remain unpaid, unless twenty years have elapsed from the testator's decease; *In re Tanqueray-Willaume and Landau*, 20 Ch. Div. 465. But this rule does not in general apply to the case of an executor selling leaseholds; *Re Whistler*, 35 Ch. Div. 561; *Re Venn and Furze*, [1894] 2 Ch. 101.

(*q*) *Per* Lord Campbell, L.C., *Greville* v. *Browne*, 7 H. L. C., at p. 697; Hawk. Wills, 294.

(*r*) *Re Boards*, [1895] 1 Ch. 499.

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It is immaterial whether the residue is given to the executors or to another person (*s*), or whether the gift of the residue follows or precedes the gift of the legacies (*t*). The rule is even applied where a specific gift of real estate intervenes between the gift of the legacies and the gift of the residue, so that the phrase "residue of real estate" could be satisfied without assuming that the legacies were to be paid out of it.

Probate.

Before the Court of Probate Act, 1857 (*u*), Ecclesiastical Courts had exclusive jurisdiction in respect to the validity and contents of wills of personalty: and probate granted by the Court (*i.e.*, a copy of the will under the seal of the Court) was conclusive evidence in this respect. But these Courts had no jurisdiction over wills of real estate. Questions as to the validity and contents of wills, so far as they dealt with real estate, were decided by the Common Law Courts; and, in such cases, the probate was not even admissible as evidence as to the validity or contents. A will relating to realty only never was and is not at the present day entitled to probate.

The Court of Probate Act, 1857 (*u*), was passed because it was thought expedient that all jurisdiction in relation to the grant and revocation of probates of wills and letters of administration should be exercised by one Court. That Act contains the following provisions as respects proof of a will where it affects real estate and the effect of probate.

Where a Will affecting real estate is proved in solemn form, or is the subject of a contentious proceeding, the heir and persons interested in the real estate to be cited.

S. 61. "Where proceedings are taken under this Act for proving a will in solemn form, or for revoking the probate of a will, on the ground of the invalidity thereof, or where, in any other contentious cause or matter under this Act, the validity of a will is disputed, unless in the several cases aforesaid the will affects only personal estate, the heir-at-law, devisees, and other persons having or pretending interest in the real estate affected by the will shall, subject to the provisions of this Act, and to the rules and orders under this Act, be cited to see proceedings, or otherwise summoned in like manner as the next-of-kin, or others having or pretending interest in the personal estate affected by a will, should be cited or summoned, and may be permitted to become parties, or intervene for their respective interests in such real estate, subject to such rules and orders and to the discretion of the Court.

(*s*) *Greville* v. *Browne*, 7 H. L. C. 689; *Re Brooke*, 3 Ch. Div. 630; *Bray* v. *Stevens*, 12 Ch. Div. 162.

(*t*) *Elliott* v. *Dearsley*, 16 Ch. Div. 322.

(*u*) 20 & 21 Vict. c. 77. As to the jurisdiction of the different Divisions of the High Court to grant probate, see *per* Jessel, M.R., *Pinney* v. *Hunt*, 6 Ch. Div. 98; *Bradford* v. *Young*, 26 Ch. Div. 656.

Where the Will is proved in solemn form or its validity otherwise decided on, the decree of the Court to be binding on the persons interested in the real estate.

S. 62. "Where probate of such will is granted after such proof in solemn form, or where the validity of the will is otherwise declared by the decree or order in such contentious cause or matter as aforesaid, the probate, decree, or order respectively shall enure for the benefit of all persons interested in the real estate affected by such will, and the probate copy of such will, or the letters of administration with such will annexed, or a copy thereof respectively, stamped with the seal of Her Majesty's Court of Probate, shall in all Courts, and in all suits and proceedings affecting real estate of whatever tenure (save proceedings by way of appeal under this Act, or for the revocation of such probate or administration), be received as conclusive evidence of the validity and contents of such will, in like manner as a probate is received in evidence in matters relating to the personal estate; and where probate is refused or revoked, on the ground of the invalidity of the will, or the invalidity of the will is otherwise declared by decree or order under this Act, such decree or order shall enure for the benefit of the heir-at-law or other persons against whose interest in real estate such will might operate, and such will shall not be received in evidence in any suit or proceeding in relation to real estate save in any proceeding by way of appeal from such decrees or orders.

Heir, in certain cases, not to be cited, and where not cited not to be affected by probate.

S. 63. "Nothing herein contained shall make it necessary to cite the heir-at-law, or other persons having or pretending interest in the real estate of a deceased person, unless it is shown to the Court, and the Court is satisfied that the deceased was at the time of his decease seised of, or entitled to, or had power to appoint by will, some real estate beneficially, or in any case where the will propounded, or of which the validity is in question, would not, in the opinion of the Court, though established as to personalty affect real estate; but in every such case, and in any other case in which the Court may, with reference to the circumstances of the property of the deceased or otherwise, think fit, the Court may proceed without citing the heir or other persons interested in real estate; provided that the probate, decree, or order of the Court, shall not in any case affect the heir or any person in respect of his interest in real estate, unless such heir or person has been cited or made party to the proceedings, or derives title under or through a person so cited or made party.

Probate or office copy to be evidence of the Will in suits concerning real estate, save where the validity of the Will is put in issue.

S. 64. "In any action at law or suit in equity, where, according to the existing law, it would be necessary to produce and prove an original will in order to establish a devise or other testamentary disposition of or affecting real estate, it shall be lawful for the party intending to establish in proof such devise or other testamentary disposition to give to the opposite party ten days at least before the trial or other proceeding in which the said proof shall be intended to be adduced, notice that he intends at the said trial or other proceeding to give in evidence as proof of the devise or other testamentary disposition the probate of the said will, or the letters of administration with the will annexed, or a copy thereof stamped with any seal of the Court of Probate; and in every such case such probate or letters of administration, or copy thereof

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respectively, stamped as aforesaid, shall be sufficient evidence of such will, and of its validity and contents, notwithstanding the same may not have been proved in solemn form, or have been otherwise declared valid in a contentious cause or matter, as herein provided, unless the party receiving such notice shall, within four days after such receipt, give notice that he disputes the validity of such devise or other testamentary disposition."

The effect of s. 64 came into question in an action of ejectment by the heir against the defendant claiming as devisee under a will (*x*). Notice was given by the defendant of his intention to give in evidence, as proof of the devise, the probate of the will, and the plaintiff failed to give counter-notice that he disputed the validity of the devise, and therefore at the trial he was not allowed to dispute it; on appeal, however, it was held that he was entitled to contest the validity at the trial. Martin, B., in giving the judgment of the Court, said:—

"Now, at the trial in the present case, the same effect was given to the probate in common form under this section, as would have been given to a probate after proof in solemn form under section 62, by which such probate is to be 'received as conclusive evidence of the contents and validity of the will, in like manner as probate is received in evidence in matters relating to the personal estate;' whereas, in section 64 no such language is used; on the contrary, it seems to be purposely avoided. The language of section 64 is, that the probate shall be 'sufficient evidence.' This enactment has a very useful and extensive application. It is well known in practice that it is a most expensive proceeding to produce the original will, which is in general in the custody of the Court of Probate; that Court will not trust it out of the possession of one of their officers, and the officer has often to be kept several days at the assizes. Section 64 has a most useful bearing in tending to prevent this expense. Again, it had been always necessary to produce one of the attesting witnesses, as section 26 of the Common Law Procedure Act, 1854 (*y*), only applies to cases where attestation is unnecessary; and this provision of section 64 appears to dispense with the necessity of calling either of the attesting witnesses, for the probate is to be sufficient evidence of the will, and of its validity and contents. But there is nothing in this section to lead to the conclusion that after notice the opposite party is not to be admitted to show that the testator was incapable, and the will invalid. To hold that the omission to give the counter-notice of an intention to dispute the validity of the will would have the effect of establishing a will, even if made by a lunatic in an asylum, would be carrying the language used far beyond its true meaning. The true meaning appears to be, when a notice has been given of the intention to use the probate in evidence, and the other side do not give a counter-notice within four days, the probate without

(*x*) *Barraclough* v. *Greenhough*, L. R. 2 Q. B. 612.

(*y*) 17 & 18 Vict. c. 125.

more will be admissible evidence of the will and its contents as to realty, and will be *primâ facie* evidence of the validity of the will and the competence of the testator; in other words, the probate alone will be sufficient evidence to go to the jury of a devise of realty; but there is nothing to prevent the other side from showing by evidence that the will is not valid, or that the testator was not competent."

By the Judicature Act, 1873 (*z*), all causes and matters within the exclusive cognisance of the Court of Probate were assigned to the Probate, Divorce, and Admiralty Division of the High Court.

(*z*) 36 & 37 Vict. c. 66, s. 34.

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CHAPTER XVI.

STATUTES OF LIMITATION.

Reasons for Statutes.

WHERE a man is wrongfully in possession of land and declines to give it up to the owner or person entitled to possess it, the latter is not allowed to take possession by force (*a*), but is put to his action. If, however, he omits to bring his action during the time prescribed by certain Statutes, called the Statutes of Limitation (*b*), he can no longer recover the land.

"It is necessary to the security of rightful possessors that they should not be molested by charges of wrongful acquisition, when by the lapse of time witnesses must have perished or been lost sight of, and the real character of the transaction can no longer be cleared up. . . . Even when the acquisition was wrongful, the dispossession, after a generation has elapsed of the probably *bonâ fide* possessors, by the revival of a claim which had been long dormant, would generally be a greater injustice, and almost always a greater private and public mischief, than leaving the original wrong without atonement" (*c*).

"The Statutes of Limitation are laws of peace and justice. When property has been so long in the possession of a family that it has passed to the children and grandchildren of those who first acquired it, and they, unconscious of any defect of title, have formed their habits and plans of life according to the income that the property produces, it would be cruel to deprive them of it. The members of the family from which it came (never having enjoyed it) suffer but little from its loss. After a great lapse of time it is impossible to get at truth, so as to do justice upon any case. You have some documents, but you may not have all that relate to the title, and those which are lost might have explained or perhaps done away entirely the effect of those which remain. Although some documents may be preserved, the witnesses necessary to make the account of the transaction complete, and for a decision, cannot. These were the reasons why the Legislature passed the Statutes of Limitation" (*d*).

(*a*) 5 Ric. II., Stat. 1, c. 8; *Edwick* v. *Hawkes*, 18 Ch. Div. 199; *ante*, p. 178; and see Lightwood on Possession of Land, Ch. VII.

(*b*) "Limitation is a certain time prescribed by statute within which the demandant in the action must prove himself or one of his ancestors to be seised;" Co. Litt. 114 b.

(*c*) Mill, Polit. Econ. Bk. II., cap. ii., s. 2.

(*d*) *White* v. *Parnther*, Kn. 227; and see *Dundee Harbour Trustees* v. *Dougall*,

Right of entry.

At Common law a claimant might have entered upon the land claimed as against a disseisor or wrongful possessor after any length of time, provided the disseisor or wrongful possessor had not died, in which case it was said that the descent "tolled,"—*i.e.*, took away—the right of entry. The Limitation Act, 1623 (*e*), took away the remedy by entry at the expiration of twenty years; and this period, therefore, applied to the action of ejectment (*f*).

Writ of right.

But even where the remedy by entry was barred, the right of the true owner might remain enforceable by a real action or writ of right. At Common law, the demandant, *i.e.*, plaintiff, in a writ of right could not recover unless he could prove that he or one of his ancestors had seisin in or since the reign of Henry I. This time was altered by the Statute of Merton (20 Hen. III. c. 8) to the reign of Henry II., and by the Statute of Westminster I. (3 Ed. I. c. 39) to the reign of Richard I.; and, ultimately, by 32 Hen. VIII. c. 2, to the period of sixty years before the *teste* of the writ (*g*). By 4 Hen. VII. c. 24, the right of the true owner might also be barred by a fine with proclamations, if the title was not asserted within five years after the proclamations made; but, as we have seen, fines have been abolished (*h*), and real actions or writs of right, except ejectment and certain others above referred to (*i*), were abolished by the Real Property Limitation Act, 1833 (*k*).

The Statutes of Limitation which were in force before 1834, only extinguished the remedy of the person out of possession; they did not transfer the right to the land to the person in possession, but the Acts now in force actually transfer the right (*l*). It must not, however, be thought that the person who acquires the right to the land by virtue of his possession takes the estate of the former owner; on the contrary, he acquires a new estate (*m*). Under the old Acts the question

1 Macq. H. L. C. 321; *Thomson* v. *Eastwood*, 2 App. Cas. 215, at p. 248, *per* Lord Hatherley (cited in M. L. P. P., p. 359); Lightwood on Possession of Land, Ch. IX.; *Dalton* v. *Angus*, 6 App. Cas., at p. 818, *per* Lord Blackburn.

(*e*) 21 Jac. I. c. 16.

(*f*) See 2 Wms. Saund. 175, note (2).

(*g*) As to the old law, see Co. Litt. 114 b, *et seq.*; 2 Coke's Rep. by Fraser, 274, note; 3 Cruise, Dig. 430, *et seq.*; Burton, Comp. (363), *et seq.*; Shelford, R. P. Stat. 114; *Angus* v. *Dalton*, 3 Q. B. D. 85, at p. 103, *per* Cockburn, C.J.

(*h*) *Ante*, p. 71.

(*i*) *Ante*, p. 7.

(*k*) 3 & 4 Will. IV. c. 27.

(*l*) *Ib.*, s. 34; see 2 Sm. L. C. 701; *Doe* d. *Jukes* v. *Sumner*, 14 M. & W. 39; *Kibble* v. *Fairthorne*, [1895] 1 Ch. 219.

(*m*) *Tichborne* v. *Weir*, 8 T. L. R. 713. The language of Lord St. Leonards in *Incorporated Society* v. *Richards*, 1 Dr. & War., at 289; *Burroughs* v. *M Creight*,

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Adverse possession.

sometimes arose whether the possession of the person in possession was "adverse" to the title of the right of the true owner, and if it was not, it did not bar him of his remedy. It is very difficult to say what amounted to "adverse" possession (*n*). Under the statutes now in force the doctrine of adverse possession has been done away with, and under the present law the question to be considered (in the absence of fraud (*o*)) is, whether the person in possession has been in possession for the time mentioned in the Acts (*p*); if he has, the right to the land will be extinguished though the owner was not aware that another person had acquired possession.

It has been held in a case in the Privy Council that time does not continue to run against the owner of the land after a person who has wrongfully gone into possession relinquishes it before he has acquired a title by statute (*r*).

There must be both absence of possession by the person who has the right, and actual possession by another, whether adverse or not, to bring the case within the Statute (*s*).

Real Property Limitation Acts, 1833, 1837, 1874.

The Real Property Limitation Act, 1833 (*t*), as amended by the Civil Procedure Act, 1833 (*u*), the Real Property Limitation Act, 1837 (*x*), as amended by the Real Property Limitation Act, 1874, s. 9, and the Real Property Limitation Act, 1874 (*y*), are the statutes now in force.

These Acts apply to land and rent (*z*), ecclesiastical property and advowsons (*a*), moneys secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land or

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1 Jo. & Lat., at 303; and *Scott* v. *Nixon*, 3 Dr. & War., at 407, must be taken with some qualification. See Lightwood on Possession of Land, 272, 273.

(*n*) See *Nepean* v. *Doe*, 2 Sm. L. C. 542; 2 M. & W. 894; and Shelford, R. P. Stat. 115.

(*o*) See *post*, p. 425.

(*p*) *Raine* v. *Buxton*, 14 Ch. Div. 537.

(*r*) *Agency Co.* v. *Short*, 13 App. Cas. 793. See this case discussed in 5 L. Q. R. 185; and distinguished in *Willis* v. *Howe*, [1893] 2 Ch. 545.

(*s*) *Per* Parke, B., *Smith* v. *Lloyd*, 9 Ex. 562 (where mere non-user for more than forty years of a right to get minerals was held no bar to the right); see *Agency Co.* v. *Short*, 13 App. Cas. 793, at p. 799. For an instance of dispossession by acts of ownership, see *Marshall* v. *Taylor*, [1895] 1 Ch. 641.

(*t*) 3 & 4 Will. IV. c. 27.

(*u*) 3 & 4 Will. IV. c. 42.

(*x*) 7 Will. IV. & 1 Vict. c. 28.

(*y*) 37 & 38 Vict. c. 57.

(*z*) 37 & 38 Vict. c. 57, s. 1, substituted for 3 & 4 Will. IV. c. 27, s. 2. "Rent" includes a quit-rent on copyhold land; *Howitt* v. *Harrington*, [1893] 2 Ch. 497.

(*a*) 3 & 4 Will. IV. c. 27, ss. 29—33. As to the principle of s. 29, see *Ecclesiastical Commissioners* v. *Rowe*, 5 App. Cas. 736, at p. 744.

rent (*b*), and arrears of rent or interest in respect of any sum of money charged upon or payable out of any land or rent (*c*).

Suits in equity were required to be brought within the same time as actions at law (*d*), subject to special provisions as to land or rent vested in a trustee upon an express trust (*e*). Suits in equity.

But in every case of "concealed fraud" the period of limitation does not begin to run until the fraud is, or with reasonable diligence might have been, first known or discovered (*f*); and in the case of disability to sue, arising from infancy, coverture, idiotcy, lunacy or unsoundness of mind, a period is allowed which runs from the cesser of the disability (*g*). Concealed fraud. Disabilities.

The old Statutes of Limitation did not apply to the Crown, for at Common law the maxim is, *nullum tempus occurrit regi*; but by the Crown Suits Act, 1769 (*h*), commonly called the *Nullum Tempus* Act, the rights of the Crown as regards lands and rents are barred after the lapse of sixty years. Crown.

The Real Property Limitation Act, 1833, provides that:— 3 & 4 Will. IV. c. 27

"Land." (S. 1.) "The word 'land' shall extend to manors, messuages, and all other corporeal hereditaments whatsoever, and also to tithes

(*b*) 37 & 38 Vict. c. 57, s. 8, substituted for 3 & 4 Will. IV. c. 27, s. 40.

(*c*) 3 & 4 Will. IV. c. 27, s. 42, *i.e.*, as against the land; but as to the personal remedy on a covenant to pay rent, see 3 & 4 Will. IV. c. 42, s. 3; and *post*, p. 437.

(*d*) 3 & 4 Will. IV. c. 27, s. 24. See the note in Shelford, R. P. Stat., p. 232, *et seq.*, on "Courts of Equity and the Statutes of Limitation," and Lewin, 997.

(*e*) *Ib.* s. 25. See *Patrick* v. *Simpson*, 24 Q. B. D. 128; *Price* v. *Phillips*, [1894] W. N. 213, as to what is an "express trust," and *post*, p. 432. As to sums of money or legacies charged upon land and secured by an express trust, see 37 & 38 Vict. c. 57, s. 10; *post*, p. 436. And see the Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8, which enables trustees (including executors) (s. 1) to take advantage of Statutes of Limitations, *except* (*inter alia*) "where the claim is to recover trust property;" discussed and explained in *How* v. *Winterton*, [1896] 2 Ch. 626.

(*f*) 3 & 4 Will. IV. c. 27, s. 26; *Rains* v. *Buxton*, 14 Ch. Div. 537; *Willis* v. *Howe*, 29 W. R. 70; *Lawrance* v. *Lord Norreys*, 15 App. Cas. 210 (as to what the plaintiff who sets up concealed fraud must prove, and as to how it is to be pleaded); "'Concealed fraud' does not mean the case of a party entering wrongfully into possession; it means a case of designed fraud, by which a party, knowing to whom the right belongs, conceals the circumstances giving that right, and by means of such concealment enables himself to enter and hold," *per* Kindersley, V.-C., *Petre* v. *Petre*, 1 Drewry, 397. See also *Willis* v. *Howe*, [1893] 2 Ch. 545; *Thorne* v. *Heard*, [1894] 1 Ch. 599; [1895] A. C. 495; and see *Cheetham* v. *Hoare*, L. R. 9 Eq. 571, and *Vane* v. *Vane*, L. R. 8 Ch. 383, on the proviso protecting a *bonâ fide* purchaser in cases of concealed fraud, *i.e.*, a person who is really a purchaser, and not a mere donee taking a gift under the form of a purchase.

(*g*) *Post*, p. 431.

(*h*) 9 Geo. III. c. 16, amended by the Crown Suits Act, 1861 (24 & 25 Vict. c. 62).

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(other than tithes belonging to a spiritual or eleemosynary corporation sole), and also to any share, estate or interest in them or any of them, whether the same shall be a freehold or chattel interest, and whether freehold or copyhold, or held according to any other tenure; and the word 'rent' shall extend to all heriots(*i*) and to all services and suits for which a distress may be made (*k*), and to all annuities and periodical sums of money charged upon or payable out of any land (except moduses or compositions (*l*) belonging to a spiritual or eleemosynary corporation sole)."

"Rent."

The word "land" as thus defined does not include incorporeal hereditaments, except such parts of a manor as are incorporeal, and tithes not belonging to the specified corporations (*m*).

Tithes.

At Common law mere non-payment of tithes for any length of time did not render the land tithe free unless a legal origin for the exemption could be shewn (*n*). This was remedied by the Tithe Act, 1832 (*o*); and it has been decided that the provisions of that Act are not affected by the Real Property Limitation Act, 1833 (*p*), and that the word "tithes," so far as tithes are included under the word "land" in that Act, means an estate in the tithes (*q*). The Commutation of tithes has rendered this question of but little importance. Tithe rentcharge is "rent" within the meaning of the Act (*r*).

"Rent."

The word "rent" is used in two different senses in the Real Property Limitation Act, 1833 (*s*)—viz., (1) in the sense of a rent charged upon land, or otherwise existing as a separate incorporeal hereditament; and (2) in the sense of a rent reserved under a lease. In the 2nd section, limiting the time for recovery of "any land or rent," it is used in the first sense only, *i.e.*, as meaning a rentcharge (*t*).

Grant v. *Ellis*.

Thus in *Grant* v. *Ellis* (*u*) it was held that, in ss. 2 and 3 of the Act, the word "rent" does not refer to rents reserved on leases for years by contract between the parties, but is confined to rents

(*i*) As to the application of the Act to heriots, see *Owen* v. *De Beauvoir*, 16 M. & W. 547; *Zouche* v. *Dalbiac*, L. R. 10 Ex. 172.

(*k*) Co. Litt. 150 b.

(*l*) 2 Bl. 29; 2nd Instit. 490.

(*m*) *Irish Land Commission* v. *Grant*, 10 App. Cas. 14.

(*n*) *Salkeld* v. *Johnson*, 1 Mac. & G. 242. See the cases collected in *Payne* v. *Esdaile*, 13 App. Cas. 613. As to how land can become tithe free, see *ante*, p. 356.

(*o*) 2 & 3 Will. IV. c. 100.

(*p*) 3 & 4 Will. IV. c. 27.

(*q*) *Dean of Ely* v. *Cash*, 15 M. & W. 617; *Dean of Ely* v. *Bliss*, 2 De G. M. & G. 459.

(*r*) *Irish Land Commission* v. *Grant*, 10 App. Cas. 14; see *per* Selborne, C., at p. 30.

(*s*) 3 & 4 Will. IV. c. 27.

(*t*) See *per* Denman, C.J., *Doe* d. *Angell* v. *Angell*, 9 Q. B. 328.

(*u*) 9 M. & W. 113.

existing as an inheritance distinct from the land, such as ancient rents-service, fee-farm rents, or the like (*x*), and that therefore a person entitled to the reversion expectant on the determination of a lease for years may distrain for the rent thereby reserved at any time during the existence of the lease, although no payment of rent has been made for more than the period of limitation (*y*). The reasons for this decision were thus given by Rolfe, B.:—

"In order to come to a just conclusion as to the meaning of the word 'rent' as used in the two sections (*z*) to which we have referred, it is important first to consider what is the meaning of the word 'recover,' (any land or rent, but within twenty years, &c.). Now, so far as relates to land, the word 'recover,' in this passage, clearly means the same thing as 'obtain possession or seisin of.' The clause assumes one party to be in wrongful seisin or possession of land to which another has the right, and then limits the time within which the right must be asserted.

"If such be the meaning of the word 'recover,' when used with reference to one of its objects—'land,' it is very reasonable to suppose that the Legislature intended it to have the same meaning in respect to the other object—'rent.' It is true, indeed, that with respect to an incorporeal hereditament like rent there cannot be strictly any wrongful adverse seisin or possession by another. If A. claims and receives the rent due to B., B. has still the same right against the *terre*-tenant (*a*) as if no payment had been made to A. The receipt of rent by A. is not inconsistent with a similar receipt by B., as the possession of land by A. is necessarily inconsistent with possession of the same land by B. But still, before the passing of this Act, a party seised of rents, whether rent-service, rent-charges, or rent-seck, might, in case the rent was paid to another or withheld from him, consider himself, if he thought fit, as being disseised of such rent (*b*). And a party electing to consider himself so disseised, might have the same remedy by an assize to recover seisin of his rent, as a party disseised of land might have to recover seisin of his land. The judgment in each case was the same, '*quod recuperet seisinam*'; and in each case the party was entitled to a writ of *habere facias seisinam*, which in case of a recovery rent, was executed by the sheriff delivering to the plaintiff an ox or other chattel on the land, in lieu of execution; and in case of a subsequent withholding of rent, the party aggrieved might have his writ of re-disseisin, with all

(*x*) See, as to the effect of the Statute on rents of this nature, Dar. & Bos. 279, *et seq.*; *Owen* v. *De Beauvoir*, 16 M. & W. 547; 5 Ex. 166; *Chichester* v. *Hall*, 17 L. T. 121; *Zouche* v. *Dalbiac*, L. R. 10 Ex. 172.

(*y*) *Grant* v. *Ellis*, 9 M. & W. 113. See the remarks of Lord Selborne on this case in *Irish Land Commission* v. *Grant*, 10 App. Cas. 14, at p. 26; see also 37 Sol. J. 437; Sugd. R. P. Stat. 36, 63.

(*z*) 3 & 4 Will. IV. c. 27, ss. 2 and 3.

(*a*) *I.e.*, the person entitled to the first estate of freehold in the land on which the rent is charged; *Re Herbage Rents*, [1896] 2 Ch. 811.

(*b*) As to "disseisin at election," see Lightwood on Possession of Land, 48; *Taylor* d. *Atkyns* v. *Horde*, 1 Burr. 60; 2 Sm. L. C. 559.

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its consequences, as in the case of a subsequent disseisin of lands or houses.

"Now we are of opinion, that it is to this sort of recovery only that the second section of the statute has reference; for such is clearly the meaning of the word 'recover,' when used with reference to land; and the plain grammatical construction requires us to give it the same meaning when applied to rent, unless, which is not the case here, some manifest absurdity or inconvenience should result from our so doing. It follows from hence, as a matter of course, that the word 'rent' in the second section, must necessarily be confined to rent which might in its nature have been the object of such a recovery; and this certainly does not include the rent reserved on common leases for years" (*c*).

Limitation as to land or rent.

The period within which a person may make an entry or distress or bring an action to recover land or rent (*i.e.*, rent in the first of the two senses above pointed out) is twelve years from the time at which the right to do so first accrued to the person claiming the land or rent, or to some person through whom he claims (*d*), that is, "any person by, through, or under or by the act of whom, the person so claiming became entitled to the estate or interest claimed" (*e*).

Person through whom another claims.

Time from which the period of limitation runs.

As to land or rent.

The time at which the right first accrues in various cases is defined by the 3rd and following sections of the Real Property Limitation Act, 1833 (*f*), amended by ss. 2 and 9 of the Real Property Limitation Act, 1874 (*g*): the general principle being "that, when a person has been in possession or receipt of the profits of land, or in receipt of a rent (*h*), the right accrued at the time when he ceased to hold such possession, or receive such profits or rent; while, in the case of a person who has never had such possession or receipt, the right accrued at the time when he first became entitled (whether by descent, alienation, falling in of a remainder or reversion, forfeiture, devise, or otherwise) to enter into such possession or receipt" (*i*).

(*c*) See on this passage, *per* Stirling, J., in *Howitt* v. *Harrington*, [1893] 2 Ch. 497.

(*d*) 37 & 38 Vict. c. 57, s. 1, substituted as from 31 Dec., 1878, for 3 & 4 Will. IV. c. 27, s. 2, under which the period was twenty years.

(*e*) 3 & 4 Will. IV. c. 27, s. 1. *In re Earl of Devon's Settled Estates*, [1896] 2 Ch. 562. Chitty, J., expressed the opinion that an appointee under a general power does, but an appointee under a special power does not, claim through the appointor.

(*f*) 3 & 4 Will. IV. c. 27.

(*g*) 37 & 38 Vict. c. 57.

(*h*) *E.g.*, an ancient quit-rent on freeholds; *Owen* v. *De Beauvoir*, 16 M. & W. 547; 5 Ex. 166; or a quit-rent on copyholds; *Howitt* v. *Harrington*, [1893] 2 Ch. 497.

(*i*) Dart, V. & P. 435. Time does not begin to run against a person until his right has accrued in equity as well as at

Future estate.

As to an estate or interest in reversion or remainder or other future estate or interest, the right to recover "land or rent" in general accrues when it becomes an estate or interest in possession by the determination of the prior particular estate: but if the person last entitled to the particular estate was not in possession when his interest determined, the right of the owner of the future estate to recover is barred at the end of twelve years from the time when the right to recover accrued to the owner of the particular estate, *or* at the end of six years from the time when the future estate vested in possession, whichever of those two periods shall be the longer (*k*). That is to say, if the owner of the particular estate was out of possession for six years or upwards, the period of limitation will be six years after the determination of his estate; if he was out of possession for less than six years, the owner of the future estate may recover within a period of twelve years after the particular estate determined less the period during which the owner of the particular estate was out of possession (*l*).

Mortgagee—in possession.

We have already pointed out (*m*) that the right of a mortgagor to redeem as against a mortgagee who has taken possession is barred at the end of twelve years from the time at which the mortgagee took possession or from the latest acknowledgment in writing by the mortgagee of the mortgagor's right; and that a mortgagee not in possession is allowed, as against the mortgagor, to recover the land within a period of twelve years from the last payment of any part of the principal and interest under the mortgage (*n*).

—not in possession.

Payment taking case out of statute.

The payment, in order to prevent the time running against

law; see *Warren* v. *Murray*, [1894] 2 Q. B. 648, where the person relying on the statutes had been in possession under an agreement for a lease.

(*k*) 37 & 38 Vict. c. 57, s. 2, substituted for 3 & 4 Will. IV. c. 27, s. 5. See *Re Earl of Devon's Settled Estates*, [1896] 2 Ch. 562, for an instance of the application of these provisions.

(*l*) See *Pedder* v. *Hunt*, 18 Q. B. D. 565, where it was held that the section applies only where the owner of the particular estate had a right to the possession, and was therefore inapplicable where the owner of a prior life estate had alienated his estate and so created an estate *pur autre vie* and therefore ceased to have a right to the possession.

(*m*) *Ante*, p. 202; 3 & 4 Will. IV. c. 27, s. 28; 37 & 38 Vict. c. 57, s. 7. In this case there is no saving for the disability of the mortgagor; *Forster* v. *Patterson*, 17 Ch. Div. 132; and the mortgagor may be barred where the mortgagee has been in possession of part only of the mortgaged land, so far as respects that part; *Kinsman* v. *Rouse*, 17 Ch. Div. 104.

(*n*) *Ante*, p. 203; The Real Property Limitation Act, 1837 (7 Will. IV. & 1 Vict. c. 28); 37 & 38 Vict. c. 57, s. 9. The former statute is confined to "land"

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the mortgagee, must be made by a person bound, or at least entitled, to pay. A payment by a stranger will not prevent time from running (*o*), for such a payment is a mere gift. Payment by a person who has covenanted to pay the mortgage debt (*p*), or by the tenant for life of the equity of redemption (*q*), or by the owner of part of the equity of redemption where part has been sold (*r*), is sufficient.

Effect of foreclosure.

If a mortgagee, whether legal or equitable, who has never been in possession, and to whom there has been no payment of principal or interest, commences an action for foreclosure within the period of limitation (now twelve years) and obtains judgment for foreclosure absolute (even after the expiration of the period of limitation), he may maintain an action to recover possession of the land within the period of limitation reckoned from the time of the foreclosure absolute, which gives a new right to recover possession (*s*).

Acknowledgment.

It is provided by the Real Property Limitation Act, 1833 (*t*), that "when any acknowledgment of the title of the person entitled to any land or rent shall have been given to him or his agent, in writing, signed by the person in possession or in receipt of the profits of such land, or in receipt of such rent, then" time begins to run against the person to whom or to whose agent the acknowledgment is made from the time of the acknowledgment.

It should be observed that the writing must be signed by the person in possession; an acknowledgment by his agent is not sufficient (*u*), and it must be made to the person entitled, or to his agent, not to a stranger (*x*); but no particular form of acknowledgment is necessary (*y*).

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as defined by 3 & 4 Will. IV. c. 27 (s. 1), and therefore does not apply to mortgages of rentcharges. See Dar. & Bos. 456.

(*o*) *Newbould* v. *Smith*, 29 Ch. Div. 882; 33 Ch. Div. 127 (discussed in 31 Sol. J. 228). Payment of rent by a tenant of the mortgaged property to the mortgagee, pursuant to a notice by the mortgagee requiring the rent to be paid to him, is not sufficient; *Harlock* v. *Ashberry*, 19 Ch. Div. 539.

(*p*) *Lewin* v. *Wilson*, 11 App. Cas. 639.

(*q*) *Dibb* v. *Walker*, [1893] 2 Ch. 429.

(*r*) *Chinnery* v. *Evans*, 11 H. L. C. 115.

(*s*) *Pugh* v. *Heath*, 7 App. Cas. 235, affirming *Heath* v. *Pugh*, 6 Q. B. D. 345.

(*t*) 3 & 4 Will. IV. c. 27, s. 14.

(*u*) *Ley* v. *Peter*, 3 H. & N. 101.

(*x*) *Fursden* v. *Clogg*, 10 M. & W. 572; An acknowledgment contained in an answer in Chancery, in a suit in which the person entitled was plaintiff, was held sufficient; *Goode* v. *Job*, 1 E. & E. 6.

(*y*) *Incorporated Society* v. *Richards*, 1 Dr. & War. 258; *Fursden* v. *Clogg*, 10 M. & W. 572; *Goode* v. *Job*, 1 E. & E. 6.

When a title has once been extinguished by the statute, no acknowledgment or payment of rent by the person who has acquired title under the statute can restore the old title (*z*).

Extinguished title not revived by subsequent acknowledgment.

Provision is made by the Real Property Limitation Act, 1874 (*a*), for the case of persons under the disabilities of "infancy, coverture, lunacy or unsoundness of mind." In these cases, notwithstanding that the period of limitation may have expired, a further period of six years is allowed from the time when the disability ceases or the person under disability dies. But an extreme period of limitation, viz., thirty years, is fixed in cases of disability, after which the right is barred although the person whose right is thus barred was under disability during the whole of such thirty years (*b*).

Disabilities.

By the Married Women's Property Act, 1882 (*c*), a married woman is capable "of suing and being sued either in contract or in tort or otherwise" as if she were a *feme sole*. The result appears to be that as regards the separate property of a married woman, whether it be constituted such by the provisions of some settlement, will, or other instrument, or be statutory separate estate under the Act, the disability of coverture is done away with.

Married Women.

Where the right of a tenant in tail is extinguished by the Statute, the rights of all persons whom he might have barred (under the Fines and Recoveries Act, 1833) are also extinguished (*d*); and where part of the period of limitation has run against a deceased tenant in tail, such part is reckoned as against all persons whom the deceased tenant in tail might have barred, so that any such person has only the same period allowed him as the deceased would have had if he had continued to live (*e*) (and that, notwithstanding that such person was under disability when his estate fell into possession): that is to say, the act of the tenant in tail in allowing any portion of the statutory period to run without making an entry or bringing an action, to the extent of the period allowed to lapse, binds the remainderman (*f*).

Tenants in tail.

(*z*) *Re Alison*, 11 Ch. Div. 284; *Sanders* v. *Sanders*, 19 Ch. Div. 373.

(*a*) 37 & 38 Vict. c. 57, s. 3. By the (repealed) provisions of the Real Property Limitation Act, 1833 (3 & 4 Will. IV. c. 27, s. 16), a period of ten years was allowed, and absence beyond seas was a disability. See as to successive disabilities in different persons, 3 & 4 Will. IV. c. 27, s. 18; amended 37 & 38 Vict. c. 57, s. 9.

(*b*) 37 & 38 Vict. c. 57, s. 5, replacing 3 & 4 Will. IV. c. 27, s. 17, under which the extreme period was forty years.

(*c*) 45 & 46 Vict. c. 75, s. 1 (2).

(*d*) 3 & 4 Will. IV. c. 27, s. 21.

(*e*) *Ib.* s. 22.

(*f*) See *Goodall* v. *Skerratt*, 3 Dr. 216; 1 Jur. N. S. 57.

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Base fee.

Where a tenant in tail makes an assurance which does not bar the remainders, as for instance, where A. being remainderman in tail, executes a disentailing deed under the Fines and Recoveries Act, 1833 (*g*), which, for want of the protector's consent creates only a base fee (*h*), the period of limitation begins to run, as against persons entitled to estates in remainder subsequent to the estate tail of A., as from the time at which A. or his issue could, without the consent of any third person, have barred these remainders (*i*).

Land or rent held on express trusts.

The Real Property Limitation Act, 1833 (*k*), provides that when land or rent is vested in a trustee on an express trust the right of the *cestui que trust* to bring a suit against the trustee, or any person claiming through him, to recover such land or rent shall be deemed to have first accrued at and not before the time at which the land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him. The purchaser here intended is a purchaser who takes with notice of the trust; such a purchaser will have a good title after the lapse of the statutory period of limitation (*l*), but not until then (*m*). But if a purchaser for value have no notice of the trust, he obtains a good title by the conveyance to him of the legal estate as against the *cestui que trust* (*n*); on the general principle of equity as to purchase for value without notice. The provision of the Act as to express trusts is merely declaratory of the rule of equity in force before the Act: for where the relation of trustee and *cestui que trust* exists, the possession of the trustee was always considered to be that of the *cestui que trust*, and no lapse of time enabled the trustee to claim the land as against his *cestui que trust* merely on the ground of having been continuously in possession.

"Express trust" defined.

"Express" trust means a trust which has been expressed either by writing or by word of mouth, and not a trust which

(*g*) *Ante*, p. 71.

(*h*) *Ante*, p. 74.

(*i*) 37 & 38 Vict. c. 57, s. 6 (replacing 3 & 4 Will. IV. c. 27, s. 23); see *Penny* v. *Allen*, 7 De G. M. & G., at 426.

(*k*) 3 & 4 Will. IV. c. 27, s. 25.

(*l*) *Pyrah* v. *Woodcock*, 24 L. T. (N. S.) 407; and so in cases of charitable trusts, *Magdalen College* v. *Att.-Gen.* 6 H. L. C. 189.

(*m*) See *Petre* v. *Petre*, 1 Drew. 371, 397.

(*n*) *Mansell* v. *Mansell*, 2 P. Wms. 678, at p. 681; *Att.-Gen.* v. *Flint*, 4 Hare, 147, 155, 156; Lewin, 998; *ante*, p. 294. And so in cases of charitable trusts, *Att.-Gen.* v. *Wilkins*, 17 Beav. 285.

arises from the acts of the parties or operation of law, *i.e.*, a resulting, implied, or constructive trust (*o*). Where the trust is merely constructive, *i.e.*, where a person not being the trustee appointed by an instrument, has come into possession under such circumstances that a Court would consider him to be trustee, the 25th section of the statute does not apply (*p*); therefore a constructive trustee may set up the statute against the person who but for the lapse of time would be the rightful owner (*q*).

The law as regards the claim of a *cestui que trust* against his trustee is, in accordance with the previous rule in equity (*r*), declared by the Judicature Act, 1873 (*s*), by which it is enacted that:—

> S. 25, § 2. "No claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitations."

Two exceptions to these provisions have, however, been constituted; the one (*t*) by the Trustee Act, 1888, the other by the Real Property Limitation Act, 1874 (*u*), in respect of sums of money or legacies charged on land or rent.

Lessor and lessee.

The periods of limitation as between lessor and lessee for years are regulated by the 7th, 8th and 9th sections of the Real Property Limitation Act, 1833 (*x*). The 7th section, which we shall not discuss, applies to tenancies at will (*y*). The 8th section provides that when a person is in possession of any land, or in receipt of the profits of any land, or in receipt of any rent (*i.e.*, rentcharge), as tenant from year to year, *without any lease in*

(*o*) *Per* Fry, J., *Sands to Thompson*, 22 Ch. Div. 614, 617; and see *ante*, p. 425, note (*e*); and *Soar* v. *Ashwell*, [1893] 2 Q. B. 390, 393, 396; *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 193.

(*p*) *Dickenson* v. *Teasdale*, 1 De G. J. & S. 52; *Cunningham* v. *Foot*, 3 App. Cas. 974, at p. 984; *Sands to Thompson*, 22 Ch. Div. 614. But where a testator devised his realty to his executors on trust, and omitted to declare trusts of all his realty, it was held that there was an express trust for his heir-at-law; *Patrick* v. *Simpson*, 24 Q. B. D. 128.

(*q*) *Petre* v. *Petre*, 1 Drew. 393.

(*r*) See 2 Spence's Equity, p. 248.

(*s*) 36 & 37 Vict. c. 66, s. 25, § 2.

(*t*) See *ante*, p. 425, note (*e*).

(*u*) See *post*, p. 436.

(*x*) 3 & 4 Will. IV. c. 27.

(*y*) See *Doe* d. *Bennett* v. *Turner*, 7 M. & W. 226; *Day* v. *Day*, L. R. 3 P. C. 751; see *Warren* v. *Murray*, [1894] 2 Q. B. 648, as to the effect of an agreement for a lease; *Mayor of Brighton* v. *Guardians of Brighton*, 5 C. P. D. 368; *Sands to Thompson*, 22 Ch. Div. 614, where a mortgage was paid off, the mortgagor being in possession, but no reconveyance was made; *Low Moor Co.* v. *Stanley Coal Co.*, 34 L. T. 186, where a bargain and sale, not being enrolled,

writing, time is to run against the reversioner (landlord) from the expiration of the first year or from the last time when rent (*i.e.*, rent reserved out of the land or rentcharge which is the subject of the lease) is received, which shall last happen (*z*).

It should be observed that the word "rent" is used in two different meanings in this section; where a person is spoken of as in receipt of any "rent" as tenant, the word means a rent of inheritance (*a*); but in the latter part of the section, where receipt of rent is spoken of, rent means the rent reserved on the tenancy (*b*).

The phrase "lease in writing" in this section means an instrument which operates as a lease, *i.e.*, which passes an interest to the lessee. An instrument which passes no interest is not a lease, although it may bind the lessee (*c*).

Non-payment of rent.

Mere non-payment of the rent reserved by a lease, for however long a time during the term, will not bar the reversioner: if no rent has been paid to a third person, his right to recover the land will be enforceable on the determination of the lease, though no rent has been paid to him under it (*d*). But the 9th section (*e*) of the Real Property Limitation Act, 1833 (*f*), provides that when a person is in possession under a lease *in writing* at a rent of 20*s.* or upwards, and the rent is received by a person wrongfully claiming the reversion, and no rent is afterwards paid to the person rightfully entitled to the reversion, the right of the latter "to make an entry or distress or to bring an action after the determination of the lease" is to be deemed to have accrued at the time of the first payment of the rent to the wrongful claimant; and in such cases of wrongful payment no such right is to be deemed to have first accrued upon the determination of the lease.

Wrongful receipt of rent reserved by lease.

It should be observed that neither s. 8 nor s. 9 applies

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created only a tenancy at will, but the statute gave a title after 20 years.

(*z*) *Lyell* v. *Kennedy*, 18 Q. B. D. 796; 14 App. Cas. 439. Payment of rent on account of something else than tenement will not do; *Att.-Gen.* v. *Stephens*, 6 De G. M. & G. 111, at 146. As to tenancy from year to year, see *ante*, p. 155.

(*a*) See definition of rent in s. 1 of the Act.

(*b*) See *Doe* d. *Angell* v. *Angell*, 6 Q. B. 328.

(*c*) *Doe* d. *Lansdell* v. *Gower*, 17 Q. B. 589.

(*d*) *Archbold* v. *Scully*, 9 H. L. C. 360; *Doe* v. *Oxenham*, 7 M. & W. 131.

(*e*) The word "rent" is used in this section in the two different senses above noticed; see *ante*, p. 426, and *Doe* d. *Angell* v. *Angell*, 9 Q. B. 328 as to the mode in which the section is to be read.

(*f*) 3 & 4 Will. IV. c. 27.

to the case of a lease in writing at a rent less than 20*s*. In such cases no payment of rent to the wrong person will prevent the rightful reversioner from bringing his action at the end of the term. In cases to which s. 9 applies, time begins to run against the reversioner from the time when the first payment of rent was wrongfully made (*g*).

Void leases.

If a lease is void, time begins to run against the reversioner from the date of the lease (or rather the date when the intended lessee enters), or the last payment of rent, whichever is later (*h*).

Money charged on land.

As to charges upon land, the Real Property Limitation Act, 1874 (*i*), provides that:—

"No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment (*k*), or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy (*l*), but within twelve years next after a present right to receive (*m*) the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid (*n*), or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto or his agent; and, in such case, no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given."

In cases within this section the limitation applies to the personal remedy on the covenant in a mortgage deed as well as to the remedy against the land (*o*), and to an action on a collateral bond whereby the mortgage debt is secured (*p*).

It will be observed that under this section time begins to run from the concurrence of two events: the money must be payable, and there must be some person capable of giving a discharge for it.

(*g*) *Chadwick* v. *Broadwood*, 3 Beav. 308.

(*h*) *Magdalen Hospital* v. *Knotts*, 4 App. Cas. 324; *Webster* v. *Southey*, 36 Ch. Div. 9.

(*i*) 37 & 38 Vict. c. 57, s. 8, substituted for s. 40 of 3 & 4 Will. IV. c. 27, under which the period of limitation was twenty years.

(*k*) See *Ex parte Tynte*, 15 Ch. Div. 125; *Evans* v. *O'Donnell*, 18 L. R. Ir. 170; Elph. & Cl. Searches, 50. "Judgment" in this section is not confined to judgments operating as charges on land; *Hebblethwaite* v. *Peever*, [1892] 1 Q. B. 124; *Jay* v. *Johnstone*, [1893] 1 Q. B. 189.

(*l*) Whether charged on land or not.

(*m*) As to the meaning of these words, see *Hornsey Local Board* v. *Monarch Building Society*, 24 Q. B. D. 1; *Re Owen*, [1894] 3 Ch. 220.

(*n*) See *Re England*, [1895] 2 Ch. 100 and 820.

(*o*) *Sutton* v. *Sutton*, 22 Ch. Div. 511.

(*p*) *Fearnside* v. *Flint*, 22 Ch. Div. 579.

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Legacies.

In the case of a legacy time begins to run from the expiration of twelve months after the death of the testator, unless some other time is mentioned in the will, or unless, if the legacy is charged on land, the subsistence of prior charges prevents the legatee from claiming payment of his legacy (*q*). It has been held that the provisions of the section extend to legacies not charged on land (*r*), and to cases where the legacy is vested in the executor on a constructive, as distinguished from an express, trust (*s*).

Any annuity charged on land by will is "rent" within the meaning of the Act and does not fall under this section (*t*).

Although the section does not expressly give any allowance of time in the case of disabilities, it practically does so by the words "some person capable of giving a discharge for or release of the same," as unless there is such a person the section does not apply.

Where the same person has to pay and receive interest, time does not run against him, and this was held to be so in a case where the rents which he received were at law payable to one set of trustees for him and the interest which he retained was at law payable to another set of trustees for him (*u*).

Charges secured by express trust.

By the Real Property Limitation Act, 1874, sums of money or legacies (and arrears of interest thereon) charged on land and secured by an express trust are recoverable only within the same period as if there were no such trust (*x*).

Arrears of rent or interest.

By the Real Property Limitation Act, 1833 (s. 42), it was provided (*y*) that "no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent" (*z*), should be "recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due," or an acknowledgment similar to that required by

(*q*) *Faulkner* v. *Daniel*, 3 Ha. 199, at p. 212.

(*r* *Bullock* v. *Downes*, 9 H. L. C., at 14; *Sheppard* v. *Duke*, 9 Sim. 567.

(*s*) *Re Davis*, [1891] 3 Ch. 119; *Re Barker*, [1892] 2 Ch. 491.

(*t*) *Hughes* v. *Coles*, 27 Ch. Div. 231.

(*u*) *Topham* v. *Booth*, 35 Ch. Div. 607.

(*x*) 37 & 38 Vict. c. 57, s. 10. See *Hughes* v. *Coles*, 27 Ch. Div. 231; *Re Stephens*, 43 Ch. Div. 39.

(*y*) 3 & 4 Will. IV. c. 27, s. 42. As to capitalized interest, see *Clarkson* v. *Henderson*, 14 Ch. Div. 348.

(*z*) This includes both a rent which is an incorporeal hereditament and rent reserved on a lease; Dar. & Bos. 193; and also a gross sum of money charged on land and payable by annual instalments; *Uppington* v. *Tarrant*, 12 Ir. Ch. R. 262, and an annuity charged on land; *Hughes* v. *Coles*, 27 Ch. Div. 232.

37 & 38 Vict. c. 57, s. 8 (see *ante*, p. 435), had been given. The Civil Procedure Act, 1833 (*a*), passed a few weeks later, contained (s. 3) a provision (*b*) that "all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty," &c., should be commenced within twenty years after the cause of action. The difficulty of reconciling these enactments has been solved by decisions that an action for arrears of rent upon the covenant to pay in an indenture of lease might be brought within the time limited by the later Act (*c*); but that, in a suit in equity for the purpose of establishing an annuity charged on the lands, secured also by the personal covenant of the grantor, the earlier Act applied, and only six years' arrears could be recovered (*d*). It was held (*e*) that s. 42 of the Real Property Limitation Act, 1833, was applicable only to the land, and s. 3 of the Civil Procedure Act, 1833, was applicable only to the person: the combined effect of the two enactments being that no more than six years' arrears of rent or interest in respect of any sum charged upon or payable out of any land or rent could be recovered by any distress, action, or suit, except in actions upon covenant or debt upon specialty, in which case the limitation would be twenty years.

Acquiescence.

The jurisdiction of equity to refuse relief, notwithstanding that the period of limitation has not elapsed, is thus saved by the Real Property Limitation Act, 1833 (*f*):—

> S. 27. "Nothing in this Act contained shall be deemed to interfere with any rule or jurisdiction of Courts of Equity in refusing relief on the ground of Acquiescence or otherwise to any person whose right to bring a suit may not be barred by virtue of this Act" (*g*).

As to the doctrine of Acquiescence, Mr. Dart (*h*) says:—

"Mere lapse of time, except where it is a statutory or positive bar to relief, is only evidence of acquiescence: but a *cestui que trust* wishing to impeach a sale must do so within a reasonable time; which, as a matter of fact, is generally less than the time allowed by the Statute of Limitations: though, independently of statutory limitation, no positive limit of

(*a*) 3 & 4 Will. IV. c. 42.
(*b*) 3 & 4 Will. IV. c. 42, s. 3.
(*c*) *Paget* v. *Foley*, 2 Bing. N. C. 679.
(*d*) *Hunter* v. *Nockolds*, 1 Mac. & G. 640; see *Darley* v. *Tennant*, 53 L. T. 257.
(*e*) *Hunter* v. *Nockolds*, 1 Mac. & G., at p. 652, *per* Lord Cottenham, C.
(*f*) 3 & 4 Will. IV. c. 27.
(*g*) This section remains in force and is to be read with 37 & 38 Vict. c. 57; see s. 9.
(*h*) Dart, V. & P. 54.

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time can be imposed, and each case must be governed by its own circumstances. A delay of eighteen years has been held to be an implied confirmation of the transaction; ten and eleven years have been allowed in the case of an individual; and twelve in the case of creditors: but the general tendency of modern decisions and of recent legislation is to increasingly discourage stale demands; and where there are other circumstances, showing acquiescence, beyond the mere lapse of time, a short delay will be a sufficient bar to relief. A longer time, however, is allowed to a class of persons, *e.g.* creditors, than would be allowed to an individual."

Acquiescence and laches distinguished.

The difference between "acquiescence" and simple "*laches*" has been thus expressed by Lord Wensleydale:—

"Where there is a Statute of Limitations, the objection of simple *laches* does not apply until the expiration of the time allowed by the statute. But acquiescence is a different thing, it means more than *laches*. If a party who could object lies by, and knowingly permits another to incur an expense in doing an act under the belief that it would not be objected to, and so a kind of permission may be said to be given to another to alter his condition, he may be said to acquiesce: but the fact of simply neglecting to enforce a claim for the period during which the law permits him to delay without losing his right, I conceive cannot be any equitable bar"(*i*).

Pleading.

By the Rules of the Supreme Court, Statutes of Limitation are required to be expressly pleaded (*k*); but the defence may be raised by way of demurrer (*l*) in cases in which, as in the Real Property Limitation Acts, the statute operates to extinguish the title and not merely to bar the remedy of the plaintiff (*m*).

(*i*) *Per* Lord Wensleydale, *Archbold* v. *Scully*, 9 H. L. C. 383. See also *Thomson* v. *Eastwood*, 2 App. Cas. 215, *per* Lord Cairns, C., at p. 239; *In re Baker*, 20 Ch. Div. 230; *In re Maddever*, 27 Ch. Div. 523; and as to proof of acquiescence, *In re Marsden*, 26 Ch. Div. 790, *per* Kay, J.; see also *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196.

(*k*) R. S. C. Order XIX. r. 15.

(*l*) Now demurrers are abolished, the defence will be raised by the proceedings in lieu of demurrer; R. S. C. Order XXV., see r. 2.

(*m*) See *Dawkins* v. *Lord Penrhyn*, 4 App. Cas. 51.

ACTS IN APPENDIX.

THE VENDOR AND PURCHASER ACT, 1874.
[37 & 38 VICT. c. 78.]

THE CONVEYANCING ACTS, 1881 TO 1892—

THE CONVEYANCING AND LAW OF PROPERTY ACT, 1881. [44 & 45 VICT. c. 41.]

THE CONVEYANCING ACT, 1882.
[45 & 46 VICT. c. 39.]

THE CONVEYANCING AND LAW OF PROPERTY ACT, 1892. [55 & 56 VICT. c. 13.]

THE SETTLED LAND ACTS, 1882 TO 1890—

THE SETTLED LAND ACT, 1882.
[45 & 46 VICT. c. 38.]

THE SETTLED LAND ACT, 1884.
[47 & 48 VICT. c. 18.]

THE SETTLED LAND ACTS AMENDMENT ACT, 1887.
[50 & 51 VICT. c. 30.]

THE SETTLED LAND ACT, 1889.
[52 & 53 VICT. c. 36.]

THE SETTLED LAND ACT, 1890.
[53 & 54 VICT. c. 69.]

THE MARRIED WOMEN'S PROPERTY ACT, 1882.
[45 & 46 VICT. c. 75.]

THE MARRIED WOMEN'S PROPERTY ACT, 1893.
[56 & 57 VICT. c. 63.]

THE TRUSTEE ACT, 1893.
[56 & 57 VICT. c. 53, ss. 10—12.]

APPENDIX.

THE VENDOR AND PURCHASER ACT, 1874.

37 & 38 Vict. c. 78.

[37 & 38 VICT. CH. 78.]

An Act to amend the Law of Vendor and Purchaser and further to simplify title to Land (*a*). [7th August, 1874.]

Forty years substituted for sixty years as the root of title.

1. In the completion of any contract of sale of land (*b*), and subject to any stipulation to the contrary in the contract, forty years shall be substituted as the period of commencement of title which a purchaser may require in place of sixty years, the present period of such commencement; nevertheless earlier title than forty years may be required in cases similar to those in which earlier title than sixty years may be now required.

Rules for regulating obligations and rights of vendor and purchaser.

2. In the completion of any such contract as aforesaid, and subject to any stipulation to the contrary in the contract, the obligations and rights of vendor and purchaser shall be regulated by the following rules; that is to say,

First. Under a contract to grant or assign a term of years, whether derived, or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled to call for the title to the freehold (*c*).

Second. Recitals, statements, and descriptions of facts, matters, and parties contained in deeds, instruments, Acts of Parliament, or statutory declarations, twenty years old at the date of the contract, shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters, and descriptions (*d*).

Third. The inability of the vendor to furnish the purchaser with a legal covenant to produce and furnish copies of documents of title

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(*a*) The preamble and enacting words were repealed by the S. L. R. (No. 2) Act, 1893 (56 & 57 Vict. c. 54).

(*b*) As to the meaning of land, see *ante*, p. 10. This section previously to the S. L. R. (No. 2) Act, 1893 (56 & 57 Vict. c. 54), referred to contracts made after 31st of Dec. 1874.

(*c*) The lessee still has constructive notice of his lessor's title; *Patman* v. *Harland*, 17 Ch. Div. 353; see *ante*, p. 378.

(*d*) *Bolton* v. *London School Board*, 7 Ch. Div. 766; *Re Marsh and Granville*, 24 Ch. Div. 11.

37 & 38 Vict. c. 78.

shall not be an objection to title in case the purchaser will, on the completion of the contract, have an equitable right to the production of such documents.

Fourth. Such covenants for production as the purchaser can and shall require shall be furnished at his expense, and the vendor shall bear the expense of perusal and execution on behalf of and by himself, and on behalf of and by necessary parties other than the purchaser (*e*).

Fifth. Where the vendor retains any part of an estate to which any documents of title relate he shall be entitled to retain such documents (*f*).

3. Repealed and replaced by the Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 15 and 51.

4. Repealed; see *ante*, p. 210.

5. Repealed; see *ante*, p. 293.

6. Repealed; see *ante*, p. 131, 293 n. (*l*).

7. Repealed; as to England, by the Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 129; as to Ireland, by the Conv. and Law of Prop. Act, 1881 (44 & 45 Vict. c. 41), s. 73.

Non-registration of will in Middlesex, &c., cured in certain cases (*g*).

8. Where the will of a testator devising land in Middlesex or Yorkshire has not been registered within the period allowed by law in that behalf, an assurance of such land to a purchaser or mortgagee by the devisee or by some one deriving title under him shall, if registered before, take precedence of and prevail over any assurance from the testator's heir-at-law.

Vendor or purchaser may obtain decision of judge in chambers as to requisitions or objections, or compensation, &c.

9. A vendor or purchaser of real or leasehold estate in England, or their representatives respectively, may at any time or times and from time to time apply in a summary way to a judge of the Court of Chancery in England in Chambers, in respect of any requisitions or objections, or any claim for compensation (*h*), or any other question arising out of or connected with the contract (not being a question affecting the existence or validity of the contract), and the judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid.

A vendor or purchaser of real or leasehold estate in Ireland, or their representatives respectively, may in like manner and for the same purpose apply to a judge of the Court of Chancery in Ireland, and the judge shall make such order upon the application as to him shall appear

(*e*) As to the equitable right to production, see Elph. Introd. 110.

(*f*) This section does not apply to personalty except leaseholds; *Fuller and Leathley's Contract*, [1897] W. N. (54) 6.

(*g*) As to registration, see Elph. & Cl. Searches, 125, *et seq.*

(*h*) This does not include damages for wilful default: *Re Wilsons and Stevens' Contract*, [1894] 3 Ch. 546.

just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid. 37 & 38 Vict. c. 78.

10. This Act shall not apply to Scotland, and may be cited as the Vendor and Purchaser Act, 1874. Extent of Act.

CONVEYANCING AND LAW OF PROPERTY ACT, 1881 (*i*).

44 & 45 Vict. c. 41.

[44 & 45 VICT. CH. 41.]

An Act for simplifying and improving the practice of Conveyancing; and for vesting in Trustees, Mortgagees, and others various powers commonly conferred by provisions inserted in Settlements, Mortgages, Wills, and other Instruments; and for amending in various particulars the Law of Property; and for other purposes.

[22nd August, 1881.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I.—PRELIMINARY.

1.—(1.) This Act may be cited as the Conveyancing and Law of Property Act, 1881. Short title; commencement; extent.

(2.) This Act shall commence and take effect from and immediately after the thirty-first day of December one thousand eight hundred and eighty-one.

(3.) This Act does not extend to Scotland.

2. In this Act—

(i.) Property, unless a contrary intention appears, includes real and personal property, and any estate or interest in any property, real or personal, and any debt, and anything in action, and any other right or interest: Interpretation of property, land, &c.

(ii.) Land (*k*), unless a contrary intention appears, includes land of any tenure, and tenements and hereditaments, corporeal or incorporeal, and houses and other buildings, also an undivided share in land:

(iii.) In relation to land, income includes rents and profits, and possession includes receipt of income:

(iv.) Manor includes lordship, and reputed manor or lordship:

(v.) Conveyance, unless a contrary intention appears, includes assignment, appointment, lease, settlement, and other assurance, and covenant

(*i*) The Act is printed as amended by the S. L. R. Act, 1894 (57 & 58 Vict. c. 56).

(*k*) See *ante*, p. 10.

44 & 45 Vict. c. 41.

to surrender, made by deed, on a sale, mortgage, demise, or settlement of any property, or on any other dealing with or for any property; and convey, unless a contrary intention appears, has a meaning corresponding with that of conveyance:

(vi.) Mortgage includes any charge on any property for securing money or money's worth; and mortgage money means money or money's worth, secured by a mortgage; and mortgagor includes any person from time to time deriving title under the original mortgagor (*l*), or entitled to redeem a mortgage, according to his estate, interest, or right, in the mortgaged property; and mortgagee includes any person from time to time deriving title under the original mortgagee; and mortgagee in possession is, for the purposes of this Act, a mortgagee who, in right of the mortgage, has entered into and is in possession of the mortgaged property:

(vii.) Incumbrance includes a mortgage in fee, or for a less estate, and a trust for securing money, and a lien, and a charge of a portion, annuity, or other capital or annual sum; and incumbrancer has a meaning corresponding with that of incumbrance, and includes every person entitled to the benefit of an incumbrance, or to require payment or discharge thereof:

(viii.) Purchaser, unless a contrary intention appears, includes a lessee or mortgagee, and an intending purchaser, lessee, or mortgagee, or other person, who, for valuable consideration, takes or deals for any property; and purchase, unless a contrary intention appears, has a meaning corresponding with that of purchaser; but sale means only a sale properly so called:

(ix.) Rent includes yearly or other rent, toll, duty, royalty, or other reservation, by the acre, the ton, or otherwise; and fine includes premium or fore-gift, and any payment, consideration, or benefit in the nature of a fine, premium, or fore-gift:

(x.) Building purposes include the erecting and the improving of, and the adding to, and the repairing of buildings; and a building lease is a lease for building purposes or purposes connected therewith:

(xi.) A mining lease is a lease for mining purposes, that is, the searching for, winning, working, getting, making merchantable, carrying away, or disposing of mines and minerals, or purposes connected therewith, and includes a grant or licence for mining purposes:

(xii.) Will includes codicil:

(xiii.) Instrument includes deed, will, inclosure award, and Act of Parliament:

(xiv.) Securities include stocks, funds, and shares:

(xv.) Bankruptcy includes liquidation by arrangement, and any other act or proceeding in law having, under any Act for the time being in

(*l*) See *Teevan* v. *Smith*, *ante*, p. 211.

force, effects or results similar to those of bankruptcy; and bankrupt has a meaning corresponding with that of bankruptcy:

(xvi.) Writing includes print; and words referring to any instrument, copy, extract, abstract, or other document, include any such instrument, copy, extract, abstract, or other document being in writing or in print, or partly in writing and partly in print:

(xvii.) Person includes a corporation:

(xviii.) Her Majesty's High Court of Justice is referred to as the Court.

II.—Sales and other Transactions.

Contracts for Sale.

Application of stated conditions of sale to all purchases.

3.—(1.) Under a contract to sell and assign a term of years derived out of a leasehold interest in land, the intended assign shall not have the right to call for the title to the leasehold reversion (*m*).

(2.) Where land of copyhold or customary tenure has been converted into freehold by enfranchisement, then, under a contract to sell and convey the freehold, the purchaser (*n*) shall not have the right to call for the title to make the enfranchisement.

(3.) A purchaser of any property shall not require the production, or any abstract or copy, of any deed, will, or other document, dated or made before the time prescribed by law, or stipulated, for commencement of the title, even though the same creates a power subsequently exercised by an instrument abstracted in the abstract furnished to the purchaser; nor shall he require any information, or make any requisition, objection or inquiry, with respect to any such deed, will, or document, or the title prior to that time, notwithstanding that any such deed, will, or other document, or that prior title, is recited, covenanted to be produced, or noticed; and he shall assume, unless the contrary appears, that the recitals, contained in the abstracted instruments, of any deed, will, or other document, forming part of that prior title, are correct, and give all the material contents of the deed, will, or other document so recited, and that every document so recited was duly executed by all necessary parties, and perfected, if and as required, by fine, recovery, acknowledgment, inrolment, or otherwise.

(4.) Where land sold is held by lease (not including under-lease), the purchaser shall assume, unless the contrary appears, that the lease was duly granted; and, on production of the receipt for the last payment due for rent (*o*) under the lease before the date of actual completion of

(*m*) See *ante*, p. 378. The intended assign or lessee has a right to call for the production of the lease under which his vendor or lessor holds; *Gosling* v. *Woolf*, [1893] 1 Q. B. 39.

(*n*) See sub-s. (8).

(*o*) Not a peppercorn rent. See *ante*, p. 181, note (*g*).

44 & 45 Vict. c. 41.

the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the lease have been duly performed and observed up to the date of actual completion of the purchase.

(5.) Where land sold is held by under-lease, the purchaser shall assume, unless the contrary appears, that the under-lease and every superior lease were duly granted; and, on production of the receipt for the last payment due for rent under the under-lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the under-lease have been duly performed and observed up to the date of actual completion of the purchase, and further that all rent due under every superior lease, and all the covenants and provisions of every superior lease, have been paid and duly performed and observed up to that date.

(6.) On a sale of any property, the expenses of the production and inspection of all Acts of Parliament, inclosure awards, records, proceedings of courts, court rolls, deeds, wills, probates, letters of administration, and other documents, not in the vendor's possession, and the expenses of all journeys incidental to such production or inspection, and the expenses of searching for, procuring, making, verifying, and producing all certificates, declarations, evidences, and information not in the vendor's possession (*p*), and all attested, stamped, office, or other copies or abstracts of, or extracts from, any Acts of Parliament or other documents aforesaid, not in the vendor's possession, if any such production, inspection, journey, search, procuring, making, or verifying is required by a purchaser, either for verification of the abstract, or for any other purpose, shall be borne by the purchaser who requires the same; and where the vendor retains possession of any document, the expenses of making any copy thereof, attested or unattested, which a purchaser requires to be delivered to him, shall be borne by that purchaser.

(7.) On a sale of any property in lots, a purchaser of two or more lots, held wholly or partly under the same title, shall not have a right to more than one abstract of the common title, except at his own expense.

(8.) This section applies only to titles and purchasers on sales properly so called, notwithstanding any interpretation in this Act.

(9.) This section applies only if and as far as a contrary intention is not expressed in the contract of sale, and shall have effect subject to the terms of the contract and to the provisions therein contained.

(10.) This section applies only to sales made after the commencement of this Act.

(11.) Nothing in this section shall be construed as binding a pur-

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(*p*) Not excepting a deed which is the root of title; *Re Stuart's Contract*, [1896] 2 Ch. 328. But a vendor must furnish at his own expense a proper abstract: *Re Johnson and Tustin*, 30 Ch. Div. 42; *Re Ebsworth and Tidy*, 42 Ch. Div. 23.

chaser to complete his purchase in any case where, on a contract made independently of this section, and containing stipulations similar to the provisions of this section, or any of them, specific performance of the contract would not be enforced against him by the Court. 44 & 45 Vict. c. 41.

Completion of contract after death.

4.—(1.) Where at the death of any person there is subsisting a contract enforceable against his heir or devisee, for the sale of the fee simple or other freehold interest, descendible (*q*) to his heirs general, in any land, his personal representatives shall, by virtue of this Act, have power to convey the land for all the estate and interest vested in him at his death, in any manner proper for giving effect to the contract.

(2.) A conveyance made under this section shall not affect the beneficial rights of any person claiming under any testamentary disposition or as heir or next of kin of a testator or intestate.

(3.) This section applies only in cases of death after the commencement of this Act.

Discharge of Incumbrances on Sale.

Provision by Court for incumbrances, and sale freed therefrom.

5.—(1.) Where land subject to any incumbrance, whether immediately payable or not, is sold by the Court, or out of Court, the Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court, in case of an annual sum charged on the land, or of a capital sum charged on a determinable interest in the land, of such amount as, when invested in Government securities, the Court considers will be sufficient, by means of the dividends thereof, to keep down or otherwise provide for that charge, and in any other case of capital money charged on the land, of the amount sufficient to meet the incumbrance and any interest due thereon; but in either case there shall also be paid into Court such additional amount as the Court considers will be sufficient to meet the contingency of further costs, expenses, and interest, and any other contingency, except depreciation of investments, not exceeding one-tenth part of the original amount to be paid in, unless the Court for special reason thinks fit to require a larger additional amount.

(2.) Thereupon, the Court may, if it thinks fit, and either after or without any notice to the incumbrancer, as the Court thinks fit, declare the land to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale, and give directions for the retention and investment of the money in Court.

(3.) After notice served on the persons interested in or entitled to the money or fund in Court, the Court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the

(*q*) See 6 L. Q. R. 230.

44 & 45 Vict. c. 41.

same, and generally may give directions respecting the application or distribution of the capital or income thereof.

(4.) This section applies to sales not completed at the commencement of this Act, and to sales thereafter made.

General Words (*r*).

General words in conveyances of land, buildings, or manor.

6.—(1.) A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof.

(2.) A conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall by virtue of this Act operate to convey, with the land, houses, or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to, the land, houses, or other buildings conveyed, or any of them, or any part thereof.

(3.) A conveyance of a manor shall be deemed to include and shall by virtue of this Act operate to convey, with the manor, all pastures, feedings, wastes, warrens, commons, mines, minerals, quarries, furzes, trees, woods, underwoods, coppices, and the ground and soil thereof, fishings, fisheries, fowlings, courts leet, courts baron, and other courts, view of frankpledge and all that to view of frankpledge doth belong, mills, mulctures, customs, tolls, duties, reliefs, heriots, fines, sums of money, amerciaments, waifs, estrays, chief-rents, quit-rents, rentscharge, rents seck, rents of assize, fee farm rents, services, royalties, jurisdictions, franchises, liberties, privileges, easements, profits, advantages, rights, emoluments, and hereditaments whatsoever, to the manor appertaining or reputed to appertain, or at the time of conveyance demised, occupied, or enjoyed with the same, or reputed or known as part, parcel, or member thereof.

(4.) This section applies only if and as far as a contrary intention (*s*) is not expressed in the conveyance, and shall have effect subject to the terms of the conveyance and to the provisions therein contained.

(*r*) See Elph. N. & C. Interp. 186; *ante*, p. 346, notes (*t*), (*u*), and (*x*).

(*s*) See *Broomfield* v. *Williams*, [1897] 1 Ch. 602.

(5.) This section shall not be construed as giving to any person a better title to any property, right, or thing in this section mentioned than the title which the conveyance gives to him to the land or manor expressed to be conveyed, or as conveying to him any property, right, or thing in this section mentioned, further or otherwise than as the same could have been conveyed to him by the conveying parties.

(6.) This section applies only to conveyances made after the commencement of this Act.

Covenants for Title (*t*).

Covenants for title to be implied.

7.—(1.) In a conveyance there shall, in the several cases in this section mentioned, be deemed to be included, and there shall in those several cases, by virtue of this Act, be implied, a covenant to the effect in this section stated, by the person or by each person who conveys, as far as regards the subject-matter or share of subject-matter expressed to be conveyed by him, with the person, if one, to whom the conveyance is made, or with the persons jointly, if more than one, to whom the conveyance is made as joint tenants (*u*), or with each of the persons, if more than one, to whom the conveyance is made as tenants in common (*x*), that is to say :

On conveyance for value, by beneficial owner.

(A.) In a conveyance for valuable consideration, other than a mortgage, the following covenant by a person who conveys and is expressed to convey as beneficial owner (namely):

Right to convey.

That, notwithstanding (*y*) anything by the person who so conveys, or any one through whom he derives title, otherwise than by purchase for value, made, done, executed, or omitted, or knowingly suffered, the person who so conveys has, with the concurrence of every other person, if any, conveying by his direction, full power to convey the subject-matter expressed to be conveyed, subject as, if so expressed, and in the manner in which it is expressed to be conveyed, and that, notwithstanding anything as aforesaid, that subject-matter shall remain to and be quietly entered upon, received, and held, occupied, enjoyed, and taken, by the person to whom the conveyance is expressed to be made, and any person deriving title under him, and the benefit thereof shall be received and taken accordingly, without any lawful interruption or disturbance by the person who so conveys or any person conveying by his direction, or rightfully claiming or to claim by, through, under, or in trust for the person who so conveys, or any person conveying by his direction, or by, through, or under any one not being a person claiming

Quiet enjoyment.

(*t*) See Elph. N. & C. Interp. 473; Elph. Introd. 101; *ante*, pp. 376—378.

(*u*) See *ante*, p. 261.

(*x*) See *ante*, p. 266.

(*y*) See *David* v. *Sabin*, [1893] 1 Ch. 523.

44 & 45 Vict. c. 41.

Freedom from incumbrance.

in respect of an estate or interest subject whereto the conveyance is expressly made, through whom the person who so conveys derives title, otherwise than by purchase for value; and that, freed and discharged from, or otherwise by the person who so conveys sufficiently idemnified against, all such estates, incumbrances, claims, and demands other than those subject to which the conveyance is expressly made, as either before or after the date of the conveyance have been or shall be made, occasioned, or suffered by that person or by any person conveying by his direction, or by any person rightfully claiming by, through, under, or in trust for the person who so conveys, or by, through, or under any person conveying by his direction, or by, through, or under any one through whom the person who so conveys derives title, otherwise than by purchase for value; and further, that the person who so conveys, and any person conveying by his direction, and every other person having or rightfully claiming any estate or interest in the subject-matter of conveyance, other than an estate or interest subject whereto the conveyance is expressly made, by, through, under, or in trust for the person who so conveys, or by, through, or under any person conveying by his direction, or by, through, or under any one through whom the person who so conveys derives title, otherwise than by purchase for value, will, from time to time and at all times after the date of the conveyance, on the request and at the cost of any person to whom the conveyance is expressed to be made, or of any person deriving title under him, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of the conveyance to the person to whom the conveyance is made, and to those deriving title under him, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made, as by him or them or any of them shall be reasonably required:

Further assurance.

(in which covenant a purchase for value shall not be deemed to include a conveyance in consideration of marriage):

On conveyance of leaseholds for value, by beneficial owner (z).

(B.) In a conveyance of leasehold property for valuable consideration, other than a mortgage, the following further covenant by a person who conveys and is expressed to convey as beneficial owner (namely):

Validity of lease.

That, notwithstanding anything by the person who so conveys, or any one through whom he derives title otherwise than by purchase for value, made, done, executed, or omitted, or knowingly suffered, the lease or grant creating the term or estate for which the land is conveyed is, at the time of conveyance, a good, valid, and effectual lease or grant of the property conveyed, and is in full force, un-

(z) See *ante*, p. 376.

forfeited, unsurrendered, and in nowise become void or voidable, and that, notwithstanding anything as aforesaid, all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, have been paid, observed, and performed up to the time of conveyance:

(in which covenant a purchase for value shall not be deemed to include a conveyance in consideration of marriage):

On mortgage, by beneficial owner.

(C.) In a conveyance by way of mortgage (*a*), the following covenant by a person who conveys and is expressed to convey as beneficial owner (namely):

Right to convey.

That the person who so conveys, has, with the concurrence of every other person, if any, conveying by his direction, full power to convey the subject-matter expressed to be conveyed by him, subject as, if so expressed, and in the manner in which it is expressed to be conveyed; and also that, if default is made in payment of the money intended to be secured by the conveyance, or any interest thereon, or any part of that money or interest, contrary to any provision in the conveyance, it shall be lawful for the person to whom the conveyance is expressed to be made, and the persons deriving title under him, to enter into and upon, or receive, and thenceforth quietly hold, occupy, and enjoy or take and have, the subject-matter expressed to be conveyed, or any part thereof, without any lawful interruption or disturbance by the person who so conveys, or any person conveying by his direction, or any other person not being a person claiming in respect of an estate or interest subject whereto the conveyance is expressly made; and that, freed and discharged from, or otherwise by the person who so conveys sufficiently indemnified against, all estates, incumbrances, claims, and demands whatever, other than those subject whereto the conveyance is expressly made; and further, that the person who so conveys and every person conveying by his direction, and every person deriving title under any of them, and every other person having or rightfully claiming any estate or interest in the subject-matter of conveyance, or any part thereof, other than an estate or interest subject whereto the conveyance is expressly made, will from time to time and at all times, on the request of any person to whom the conveyance is expressed to be made, or of any person deriving title under him, but, as long as any right of redemption exists under the conveyance, at the cost of the person so conveying, or of those deriving title under him, and afterwards at the cost of the person making the request, execute and do all such lawful assurances and

Quiet enjoyment.

Freedom from incumbrance.

Further assurance.

(*a*) See *ante*, pp. 221, note (*t*), 377, note (*i*).

44 & 45 Vict. c. 41.

things for further or more perfectly assuring the subject-matter of conveyance and every part thereof to the person to whom the conveyance is made, and to those deriving title under him, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made, as by him or them or any of them shall be reasonably required:

On mortgage of leaseholds, by beneficial owner.

(D.) In a conveyance by way of mortgage of leasehold property, the following further covenant by a person who conveys and is expressed to convey as beneficial owner (namely):

Validity of lease.

That the lease or grant creating the term or estate for which the land is held is, at the time of conveyance, a good, valid, and effectual lease or grant of the land conveyed and is in full force, unforfeited, and unsurrendered and in nowise become void or voidable, and that all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, have been paid, observed, and performed up to the time of conveyance; and also that the person so conveying, or the persons deriving title under him, will at all times, as long as any money remains on the security of the conveyance, pay, observe, and perform, or cause to be paid, observed, and performed all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, and will keep the person to whom the conveyance is made, and those deriving title under him, indemnified against all actions, proceedings, costs, charges, damages, claims and demands, if any, to be incurred or sustained by him or them by reason of the non-payment of such rent or the non-observance or non-performance of such covenants, conditions, and agreements, or any of them:

Payment of rent and performance of covenants.

On settlement.

(E.) In a conveyance by way of settlement, the following covenant by a person who conveys and is expressed to convey as settlor (namely):

For further assurance, limited.

That a person so conveying, and every person deriving title under him by deed or act or operation of law in his lifetime subsequent to that conveyance, or by testamentary disposition or devolution in law, on his death, will, from time to time, and at all times, after the date of that conveyance, at the request and cost of any person deriving title thereunder, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of the conveyance to the persons to whom the conveyance is made and those deriving title under them, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made, as by them or any of them shall be reasonably required:

44 & 45 Vict. c. 41.

On conveyance by trustee or mortgagee

(F.) In any conveyance, the following covenant by every person who conveys and is expressed to convey as trustee or mortgagee, or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition, or under an order of the Court, which covenant shall be deemed to extend to every such person's own acts only (namely):

Against incumbrances.

That the person so conveying has not executed or done, or knowingly suffered, or been party or privy to, any deed or thing, whereby or by means whereof the subject-matter of the conveyance, or any part thereof, is or may be impeached, charged, affected, or incumbered in title, estate, or otherwise, or whereby or by means whereof the person who so conveys is in anywise hindered from conveying the subject-matter of the conveyance, or any part thereof, in the manner in which it is expressed to be conveyed.

(2.) Where in a conveyance it is expressed that by direction of a person expressed to direct as beneficial owner another person conveys, then, within this section, the person giving the direction, whether he conveys and is expressed to convey as beneficial owner or not, shall be deemed to convey and to be expressed to convey as beneficial owner the subject-matter so conveyed by his direction; and a covenant on his part shall be implied accordingly (*b*).

(3.) Where a wife conveys and is expressed to convey as beneficial owner, and the husband also conveys and is expressed to convey as beneficial owner, then, within this section, the wife shall be deemed to convey and to be expressed to convey by direction of the husband, as beneficial owner; and, in addition to the covenant implied on the part of the wife, there shall also be implied, first, a covenant on the part of the husband as the person giving that direction, and secondly, a covenant on the part of the husband in the same terms as the covenant implied on the part of the wife.

(4.) Where in a conveyance a person conveying is not expressed to convey as beneficial owner, or as settlor, or as trustee, or as mortgagee, or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition, or under an order of the Court, or by direction of a person as beneficial owner, no covenant on the part of the person conveying shall be, by virtue of this section, implied in the conveyance.

(5.) In this section a conveyance includes a deed conferring the right to admittance to copyhold or customary land, but does not include a demise by way of lease at a rent, or any customary assurance, other than a deed, conferring the right to admittance to copyhold or customary land.

(6.) The benefit of a covenant implied as aforesaid shall be annexed

(*b*) See *ante*, p. 51, note (*n*); 1 K. & E., pp. 400, 409.

44 & 45 Vict. c. 41.

and incident to, and shall go with, the estate or interest of the implied covenantee, and shall be capable of being enforced by every person in whom that estate or interest is, for the whole or any part thereof, from time to time vested.

(7.) A covenant implied as aforesaid may be varied or extended by deed, and, as so varied or extended, shall, as far as may be, operate in the like manner, and with all the like incidents, effects, and consequences, as if such variations or extensions were directed in this section to be implied.

(8.) This section applies only to conveyances made after the commencement of this Act.

Execution of Purchase Deed.

Rights of purchaser as to execution.

8.—(1.) On a sale, the purchaser shall not be entitled to require that the conveyance to him be executed in his presence, or in that of his solicitor, as such; but shall be entitled to have, at his own cost, the execution of the conveyance attested by some person appointed by him, who may, if he thinks fit, be his solicitor.

(2.) This section applies only to sales made after the commencement of this Act.

Production and Safe Custody of Title-Deeds (c).

Acknowledgment of right to production, and undertaking for safe custody of documents.

9.—(1.) Where a person retains possession of documents, and gives to another an acknowledgment in writing of the right of that other to production of those documents, and to delivery of copies thereof (in this section called an acknowledgment), that acknowledgment shall have effect as in this section provided.

(2.) An acknowledgment shall bind the documents to which it relates in the possession or under the control of the person who retains them, and in the possession or under the control of every other person having possession or control thereof from time to time, but shall bind each individual possessor or person as long only as he has possession or control thereof; and every person so having possession or control from time to time shall be bound specifically to perform the obligations imposed under this section by an acknowledgment, unless prevented from so doing by fire or other inevitable accident.

(3.) The obligations imposed under this section by an acknowledgment are to be performed from time to time at the request in writing of the person to whom an acknowledgment is given, or of any person, not being a lessee at a rent, having or claiming any estate, interest, or right through or under that person, or otherwise becoming through or under

(c) Elph. Introd. 11c.

that person interested in or affected by the terms of any document to which the acknowledgment relates.

(4.) The obligations imposed under this section by an acknowledgment are—

(i.) An obligation to produce the documents or any of them at all reasonable times for the purpose of inspection, and of comparison with abstracts or copies thereof, by the person entitled to request production, or by any one by him authorized in writing; and

(ii.) An obligation to produce the documents or any of them at any trial, hearing, or examination in any Court, or in the execution of any commission, or elsewhere in the United Kingdom, on any occasion on which production may properly be required, for proving or supporting the title or claim of the person entitled to request production, or for any other purpose relative to that title or claim; and

(iii.) An obligation to deliver to the person entitled to request the same true copies or extracts, attested or unattested, of or from the documents or any of them.

(5.) All costs and expenses of or incidental to the specific performance of any obligation imposed under this section by an acknowledgment shall be paid by the person requesting performance.

(6.) An acknowledgment shall not confer any right to damages for loss or destruction of, or injury to, the documents to which it relates, from whatever cause arising.

(7.) Any person claiming to be entitled to the benefit of an acknowledgment may apply to the Court for an order directing the production of the documents to which it relates, or any of them, or the delivery of copies of or extracts from those documents or any of them to him, or some person on his behalf; and the Court may, if it thinks fit, order production, or production and delivery, accordingly, and may give directions respecting the time, place, terms, and mode of production or delivery, and may make such order as it thinks fit respecting the costs of the application, or any other matter connected with the application.

(8.) An acknowledgment shall by virtue of this Act satisfy any liability to give a covenant for production and delivery of copies of or extracts from documents.

(9.) Where a person retains possession of documents and gives to another an undertaking in writing for safe custody thereof, that undertaking shall impose on the person giving it, and on every person having possession or control of the documents from time to time, but on each individual possessor or person as long only as he has possession or control thereof, an obligation to keep the documents safe, whole, uncancelled, and undefaced, unless prevented from so doing by fire or other inevitable accident.

44 & 45 Vict. c. 41.

(10.) Any person claiming to be entitled to the benefit of such an undertaking may apply to the Court to assess damages for any loss, destruction of, or injury to the documents or any of them, and the Court may, if it thinks fit, direct an inquiry respecting the amount of damage, and order payment thereof by the person liable, and may make such order as it thinks fit respecting the costs of the application, or any other matter connected with the application.

(11.) An undertaking for safe custody of documents shall by virtue of this Act satisfy any liability to give a covenant for safe custody of documents.

(12.) The rights conferred by an acknowledgment or an undertaking under this section shall be in addition to all such other rights relative to the production, or inspection, or the obtaining of copies of documents as are not, by virtue of this Act, satisfied by the giving of the acknowledgment or undertaking, and shall have effect subject to the terms of the acknowledgment or undertaking, and to any provisions therein contained.

(13.) This section applies only if and as far as a contrary intention is not expressed in the acknowledgment or undertaking.

(14.) This section applies only to an acknowledgment or undertaking given, or a liability respecting documents incurred, after the commencement of this Act.

III.—Leases.

Rent and benefit of lessee's covenants to run with reversion (*d*).

10.—(1.) Rent reserved by a lease, and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessee's part to be observed or performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and shall be capable of being recovered, received, enforced, and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased.

(2.) This section applies only to leases made after the commencement of this Act.

Obligation of lessor's covenants to run with reversion (*e*).

11.—(1.) The obligation of a covenant entered into by a lessor with reference to the subject-matter of the lease shall, if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to and shall

(*d*) Elph. Introd. 240; see *ante*, pp. 170—172 and 198, note (*m*).

(*e*) See *ante*, p. 172.

go with that reversionary estate, or the several parts thereof, notwithstanding severance of that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise; and, if and as far as the lessor has power to bind the person from time to time entitled to that reversionary estate, the obligation aforesaid may be taken advantage of and enforced against any person so entitled.

(2.) This section applies only to leases made after the commencement of this Act.

Apportionment of conditions on severance, &c. (*f*)

12.—(1.) Notwithstanding the severance by conveyance, surrender, or otherwise, of the reversionary estate in any land comprised in a lease, and notwithstanding the avoidance or cesser in any other manner of the term granted by a lease as to part only of the land comprised therein, every condition or right of re-entry, and every other condition, contained in the lease, shall be apportioned, and shall remain annexed to the severed parts of the reversionary estate as severed, and shall be in force with respect to the term whereon each severed part is reversionary, or the term in any land which has not been surrendered, or as to which the term has not been avoided or has not otherwise ceased, in like manner as if the land comprised in each severed part, or the land as to which the term remains subsisting, as the case may be, had alone originally been comprised in the lease.

(2.) This section applies only to leases made after the commencement of this Act.

On sub-demise, title to leasehold reversion not to be required (*g*).

13.—(1.) On a contract to grant a lease for a term of years to be derived out of a leasehold interest, with a leasehold reversion, the intended lessee shall not have the right to call for the title to that reversion.

(2.) This section applies only if and so far as a contrary intention is not expressed in the contract, and shall have effect subject to the terms of the contract and to the provisions therein contained.

(3.) This section applies only to contracts made after the commencement of this Act.

Forfeiture.

Restrictions on and relief against forfeiture of leases (*h*).

14.—(1.) A right of re-entry or forfeiture under any proviso or stipulation in a lease (*i*), for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of and, if the breach is capable of remedy, requiring

(*f*) See *ante*, pp. 174—175.

(*g*) See *ante*, pp. 378—379.

(*h*) See *ante*, pp. 175—177; Elph. Introd. 230; as to procedure under this section, see 37 Sol. J. 663. This section is printed as amended by S. L. R. Act, 1894 (57 & 58 Vict. c. 56).

(*i*) See note (*l*) below.

44 & 45 Vict. c. 41.

the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.

(2.) Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee (*k*) may, in the lessor's action, if any, or in any action brought by himself, apply to the Court for relief; and the Court may grant or refuse relief, as the Court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the Court, in the circumstances of each case, thinks fit.

(3.) For the purposes of this section a lease includes an original or derivative under-lease, also a grant at a fee-farm rent, or securing a rent by condition (*l*); and a lessee includes an original or derivative under-lessee, and the heirs, executors, administrators, and assigns of a lessee, also a grantee under such a grant as aforesaid, his heirs and assigns; and a lessor includes an original or derivative under-lessor, and the heirs, executors, administrators, and assigns of a lessor, also a grantor as aforesaid, and his heirs and assigns.

(4.) This section applies although the proviso or stipulation under which the right of re-entry or forfeiture accrues is inserted in the lease in pursuance of the directions of any Act of Parliament.

(5.) For the purposes of this section a lease limited to continue as long only as the lessee abstains from committing a breach of covenant shall be and take effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach.

(6.) This section does not extend—

(i.) To a covenant or condition against the assigning, underletting, parting with the possession, or disposing of the land leased; or to a condition for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessee's interest (*m*);

(ii.) Or in case of a mining lease, to a covenant or condition for allowing the lessor to have access to or inspect books, accounts, records, weighing-machines or other things, or to enter or inspect the mine or the workings thereof.

(*k*) As to the relief of under-lessees, see the Conv. and Law of Prop. Act, 1892 (55 & 56 Vict. c. 13), s. 4, *post*, p. 495; and *ante*, p. 177, note (*u*).

(*l*) Extended by the Conv. and Law of Prop. Act, 1892 (55 & 56 Vict. c. 13), s. 5, see *post*, p. 496.

(*m*) Amended by Conv. and Law of Prop. Act, 1892 (55 & 56 Vict. c. 13), s. 2 (2) and (3), *ante*, p. 176.

(8.) This section shall not affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent (*n*).

(9.) This section applies to leases made either before or after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary.

IV.—Mortgages.

Obligation on mortgagee to transfer instead of reconveying (*o*).

15.—(1.) Where a mortgagor is entitled to redeem, he shall, by virtue of this Act, have power to require the mortgagee, instead of re-conveying, and on the terms on which he would be bound to re-convey, to assign the mortgage-debt and convey the mortgaged property to any third person, as the mortgagor directs; and the mortgagee shall, by virtue of this Act, be bound to assign and convey accordingly.

(2.) This section does not apply in the case of a mortgagee being or having been in possession.

(3.) This section applies to mortgages made either before or after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary.

Power for mortgagor to inspect title-deeds (*p*).

16.—(1.) A mortgagor, as long as his right to redeem subsists, shall, by virtue of this Act, be entitled from time to time, at reasonable times, on his request, and at his own cost, and on payment of the mortgagee's costs and expenses in this behalf, to inspect and make copies or abstracts of or extracts from the documents of title relating to the mortgaged property in the custody or power of the mortgagee.

(2.) This section applies only to mortgages made after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary.

Restriction on consolidation of mortgages (*q*).

17.—(1.) A mortgagor seeking to redeem any one mortgage, shall, by virtue of this Act, be entitled to do so, without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem.

(2.) This section applies only if and as far as a contrary intention is not expressed in the mortgage deeds or one of them.

(3.) This section applies only where the mortgages or one of them are or is made after the commencement of this Act.

Leases.

Leasing power of mortgagor and of mortgagee in possession (*r*).

18.—(1.) A mortgagor of land while in possession shall, as against every incumbrancer, have, by virtue of this Act, power to make from

(*n*) See *ante*, pp. 177, note (*o*), 177, 178, 332, note (*u*).

(*o*) See *ante*, pp. 210—212.

(*p*) See Elph. Introd. 110; 33 Sol. J. 707.

(*q*) See *ante*, p. 225.

(*r*) See *ante*, pp. 197, 198.

44 & 45 Vict. c. 41.

time to time any such lease of the mortgaged land, or any part thereof, as is in this section described and authorized.

(2.) A mortgagee of land while in possession shall, as against all prior incumbrancers, if any, and as against the mortgagor, have, by virtue of this Act, power to make from time to time any such lease as aforesaid.

(3.) The leases which this section authorizes are—

(i.) An agricultural or occupation lease for any term not exceeding twenty-one years; and

(ii.) A building lease for any term not exceeding ninety-nine years.

(4.) Every person making a lease under this section may execute and do all assurances and things necessary or proper in that behalf.

(5.) Every such lease shall be made to take effect in possession not later than twelve months after its date.

(6.) Every such lease shall reserve the best rent that can reasonably be obtained, regard being had to the circumstances of the case, but without any fine being taken.

(7.) Every such lease shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days.

(8.) A counterpart of every such lease shall be executed by the lessee and delivered to the lessor, of which execution and delivery the execution of the lease by the lessor shall, in favour of the lessee and all persons deriving title under him, be sufficient evidence.

(9.) Every such building lease shall be made in consideration of the lessee, or some person by whose direction the lease is granted, having erected, or agreeing to erect within not more than five years from the date of the lease, buildings, new or additional, or having improved or repaired buildings, or agreeing to improve or repair buildings within that time, or having executed, or agreeing to execute, within that time, on the land leased, an improvement for or in connection with building purposes.

(10.) In any such building lease a peppercorn rent, or a nominal or other rent less than the rent ultimately payable, may be made payable for the first five years, or any less part of the term.

(11.) In case of a lease by the mortgagor, he shall, within one month after making the lease, deliver to the mortgagee, or, where there are more than one, to the mortgagee first in priority, a counterpart of the lease duly executed by the lessee; but the lessee shall not be concerned to see that this provision is complied with.

(12.) A contract to make or accept a lease under this section may be enforced by or against every person on whom the lease if granted would be binding.

(13.) This section (*s*) applies only if and as far as a contrary intention

(*s*) See *ante*, p. 198, note (*o*).

is not expressed by the mortgagor and mortgagee in the mortgage deed, or otherwise in writing, and shall have effect subject to the terms of the mortgage deed or of any such writing and to the provisions therein contained.

(14.) Nothing in this Act shall prevent the mortgage deed from reserving to or conferring on the mortgagor or the mortgagee, or both, any further or other powers of leasing or having reference to leasing; and any further or other powers so reserved or conferred shall be exercisable, as far as may be, as if they were conferred by this Act, and with all the like incidents, effects, and consequences, unless a contrary intention is expressed in the mortgage deed.

(15.) Nothing in this Act shall be construed to enable a mortgagor or mortgagee to make a lease for any longer term or on any other conditions than such as could have been granted or imposed by the mortgagor, with the concurrence of all the incumbrancers, if this Act had not been passed.

(16.) This section applies only in case of a mortgage made after the commencement of this Act; but the provisions thereof, or any of them, may, by agreement in writing made after the commencement of this Act, between mortgagor and mortgagee, be applied to a mortgage made before the commencement of this Act, so, nevertheless, that any such agreement shall not prejudicially affect any right or interest of any mortgagee not joining in or adopting the agreement.

(17.) The provisions of this section referring to a lease shall be construed to extend and apply, as far as circumstances admit, to any letting, and to an agreement, whether in writing or not, for leasing or letting.

Sale; Insurance; Receiver; Timber.

Powers incident to estate or interest of mortgagee.

19.—(1.) A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely):

(i.) A power, when the mortgage money has become due, to sell or to concur with any other person in selling, the mortgaged property, or any part thereof, either subject to prior charges, or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as he (the mortgagee) thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to re-sell, without being answerable for any loss occasioned thereby (*t*); and

(*t*) The effect of the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 44, as modified by the Trustee Act, 1894 (57 Vict. c. 10), s. 3, is to enable a sale to be made of minerals apart from the surface under this power; and see *ante*, pp. 205, 206.

44 & 45 Vict. c. 41.

(ii.) A power, at any time after the date of the mortgage deed, to insure (*u*) and keep insured against loss or damage by fire any building, or any effects or property of an insurable nature, whether affixed to the freehold or not, being or forming part of the mortgaged property, and the premiums paid for any such insurance shall be a charge on the mortgaged property, in addition to the mortgage money, and with the same priority, and with interest at the same rate, as the mortgage money; and

(iii.) A power, when the mortgage money has become due, to appoint a receiver (*x*) of the income of the mortgaged property, or of any part thereof; and

(iv.) A power, while the mortgagee is in possession, to cut and sell timber and other trees ripe for cutting, and not planted or left standing for shelter or ornament, or to contract for any such cutting and sale, to be completed within any time not exceeding twelve months from the making of the contract.

(2.) The provisions of this Act relating to the foregoing powers comprised either in this section, or in any subsequent section regulating the exercise of those powers, may be varied or extended by the mortgage deed, and, as so varied or extended, shall, as far as may be, operate in the like manner and with all the like incidents, effects, and consequences, as if such variations or extensions were contained in this Act.

(3.) This section applies only if and as far as a contrary intention is not expressed in the mortgage deed, and shall have effect subject to the terms of the mortgage deed and to the provisions therein contained.

(4.) This section applies only where the mortgage deed is executed after the commencement of this Act.

20. A mortgagee shall not exercise the power of sale conferred by this Act unless and until—

Regulation of exercise of power of sale (*y*).

(i.) Notice (*z*) requiring payment of the mortgage money has been served on the mortgagor or one of several mortgagors, and default has been made in payment of the mortgage money, or of part thereof, for three months (*a*) after such service; or

(ii.) Some interest under the mortgage is in arrear and unpaid for two months (*a*) after becoming due; or

(iii.) There has been a breach of some provision contained in the mortgage deed or in this Act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage money or interest thereon.

(*u*) See *ante*, pp. 208, 209.
(*x*) See *ante*, pp. 207, 208.
(*y*) See Elph. Introd. 164.
(*z*) See *post*, s. 67.
(*a*) *I.e.*, calendar months, *ante*, p. 156, note (*i*).

44 & 45 Vict. c. 41.

Conveyance, receipt, &c., on sale.

21.—(1.) A mortgagee exercising the power of sale conferred by this Act shall have power, by deed, to convey the property sold, for such estate and interest therein as is the subject of the mortgage (*b*) freed from all estates, interests, and rights to which the mortgage has priority, but subject to all estates, interests, and rights which have priority to the mortgage; except that, in the case of copyhold or customary land, the legal right to admittance shall not pass by a deed under this section, unless the deed is sufficient otherwise by law, or is sufficient by custom, in that behalf.

(2.) Where a conveyance is made in professed exercise of the power of sale conferred by this Act, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

(3.) The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances to which the sale is not made subject, if any, or after payment into Court under this Act of a sum to meet any prior incumbrance, shall be held by him in trust to be applied by him, first, in payment of all costs, charges, and expenses, properly incurred by him, as incident to the sale or any attempted sale, or otherwise; and secondly, in discharge of the mortgage money, interest, and costs, and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorized to give receipts for the proceeds of the sale thereof.

(4.) The power of sale conferred by this Act may be exercised by any person for the time being entitled to receive and give a discharge for the mortgage money.

(5.) The power of sale conferred by this Act shall not affect the right of foreclosure.

(6.) The mortgagee, his executors, administrators, or assigns, shall not be answerable for any involuntary loss happening in or about the exercise or execution of the power of sale conferred by this Act or of any trust connected therewith.

(7.) At any time after the power of sale conferred by this Act has become exercisable, the person entitled to exercise the same may demand and recover from any person, other than a person having in the mortgaged property an estate, interest, or right in priority to the mortgage, all the deeds and documents relating to the property, or to the title thereto, which a purchaser under the power of sale would be entitled to demand and recover from him.

(*b*) See *ante*, p. 184, note (*z*).

44 & 45 Vict. c. 41.

Mortgagees' receipts, discharges, &c.

22.—(1.) The receipt in writing of a mortgagee shall be a sufficient discharge for any money arising under the power of sale conferred by this Act, or for any money or securities comprised in his mortgage, or arising thereunder; and a person paying or transferring the same to the mortgagee shall not be concerned to inquire whether any money remains due under the mortgage.

(2.) Money received by a mortgagee under his mortgage or from the proceeds of securities comprised in his mortgage shall be applied in like manner as in this Act directed respecting money received by him arising from a sale under the power of sale conferred by this Act; but with this variation, that the costs, charges, and expenses payable shall include the costs, charges, and expenses properly incurred of recovering and receiving the money or securities, and of conversion of securities into money, instead of those incident to sale.

Amount and application of insurance money.

23.—(1.) The amount of an insurance effected by a mortgagee against loss or damage by fire under the power in that behalf conferred by this Act shall not exceed the amount specified in the mortgage deed, or, if no amount is therein specified, then shall not exceed two third parts of the amount that would be required, in case of total destruction, to restore the property insured.

(2.) An insurance shall not, under the power conferred by this Act, be effected by a mortgagee in any of the following cases (namely):

(i.) Where there is a declaration in the mortgage deed that no insurance is required:

(ii.) Where an insurance is kept up by or on behalf of the mortgagor in accordance with the mortgage deed:

(iii.) Where the mortgage deed contains no stipulation respecting insurance, and an insurance is kept up by or on behalf of the mortgagor, to the amount in which the mortgagee is by this Act authorized to insure.

(3.) All money received on an insurance effected under the mortgage deed or under this Act shall, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received.

(4.) Without prejudice to any obligation to the contrary imposed by law, or by special contract, a mortgagee may require that all money received on an insurance be applied in or towards discharge of the money due under his mortgage (*c*).

Appointment, powers, remuneration, and duties of receiver (*d*).

24.—(1.) A mortgagee entitled to appoint a receiver under the power in that behalf conferred by this Act shall not appoint a receiver until he has become entitled to exercise the power of sale conferred by this Act, but may then, by writing under his hand, appoint such person as he thinks fit to be receiver.

(*c*) Elph. Introd. 154.

(*d*) See *ante*, pp. 207, 208.

(2.) The receiver shall be deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver's acts or defaults, unless the mortgage deed otherwise provides.

(3.) The receiver shall have power to demand and recover all the income of the property of which he is appointed receiver, by action, distress or otherwise, in the name either of the mortgagor or of the mortgagee, to the full extent of the estate or interest which the mortgagor could dispose of, and to give effectual receipts, accordingly, for the same.

(4.) A person paying money to the receiver shall not be concerned to inquire whether any case has happened to authorize the receiver to act.

(5.) The receiver may be removed, and a new receiver may be appointed from time to time by the mortgagee by writing under his hand.

(6.) The receiver shall be entitled to retain out of any money received by him, for his remuneration, and in satisfaction of all costs, charges, and expenses incurred by him as receiver, a commission at such rate, not exceeding five per centum on the gross amount of all money received, as is specified in his appointment, and if no rate is so specified, then at the rate of five per centum on that gross amount, or at such higher rate as the Court thinks fit to allow, on application made by him for that purpose.

(7.) The receiver shall, if so directed in writing by the mortgagee, insure and keep insured against loss or damage by fire, out of the money received by him, any building, effects, or property comprised in the mortgage, whether affixed to the freehold or not, being of an insurable nature.

(8.) The receiver shall apply all money received by him as follows (namely):

(i.) In discharge of all rents, taxes, rates, and outgoings whatever affecting the mortgaged property; and

(ii.) In keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in right whereof he is receiver; and

(iii.) In payment of his commission, and of the premiums on fire, life, or other insurances, if any, properly payable under the mortgage deed or under this Act, and the cost of executing necessary or proper repairs directed in writing by the mortgagee; and

(iv.) In payment of the interest accruing due in respect of any principal money due under the mortgage:

and shall pay the residue of the money received by him to the person who, but for the possession of the receiver, would have been entitled to receive the income of the mortgaged property, or who is otherwise entitled to that property.

44 & 45 Vict. c. 41.

Action respecting Mortgage.

Sale of mortgaged property in action for foreclosure, &c. (*e*)

25.—(1.) Any person entitled to redeem mortgaged property may have a judgment or order for sale instead of for redemption in an action brought by him either for redemption alone, or for sale alone, or for sale or redemption, in the alternative.

(2.) In any action, whether for foreclosure, or for redemption, or for sale, or for the raising and payment in any manner of mortgage money, the Court, on the request of the mortgagee, or of any person interested either in the mortgage money or in the right of redemption, and, notwithstanding the dissent of any other person, and notwithstanding that the mortgagee or any person so interested does not appear in the action, and without allowing any time for redemption or for payment of any mortgage money, may, if it thinks fit, direct a sale of the mortgaged property, on such terms as it thinks fit, including, if it thinks fit, the deposit in Court of a reasonable sum fixed by the Court, to meet the expenses of sale and to secure performance of the terms.

(3.) But, in an action brought by a person interested in the right of redemption and seeking a sale, the Court may, on the application of any defendant, direct the plaintiff to give such security for costs as the Court thinks fit, and may give the conduct of the sale to any defendant, and may give such directions as it thinks fit respecting the costs of the defendants or any of them.

(4.) In any case within this section the Court may, if it thinks fit, direct a sale without previously determining the priorities of incumbrancers.

(5.) This section applies to actions brought either before or after the commencement of this Act.

(7.) This section does not extend to Ireland.

V.—Statutory Mortgage.

Form of statutory mortgage in schedule.

26.—(1.) A mortgage of freehold or leasehold land may be made by a deed expressed to be made by way of statutory mortgage, being in the form given in Part I. of the Third Schedule to this Act, with such variations and additions, if any, as circumstances may require, and the provisions of this section shall apply thereto.

(2.) There shall be deemed to be included, and there shall by virtue of this Act be implied, in the mortgage deed—

First, a covenant with the mortgagee by the person expressed therein to convey as mortgagor to the effect following (namely) :

(*e*) See *ante*, pp. 204, 205. This section is printed as amended by the S. L. R. Act, 1894 (57 & 58 Vict. c. 56).

That the mortgagor will, on the stated day, pay to the mortgagee the stated mortgage money, with interest thereon in the meantime, at the stated rate, and will thereafter, if and as long as the mortgage money or any part thereof remains unpaid, pay to the mortgagee interest thereon, or on the unpaid part thereof, at the stated rate, by equal half-yearly payments, the first thereof to be made at the end of six calendar months from the day stated for payment of the mortgage money :

Secondly, a proviso to the effect following (namely) :

That if the mortgagor, on the stated day, pays to the mortgagee the stated mortgage money, with interest thereon in the meantime, at the stated rate, the mortgagee at any time thereafter, at the request and cost of the mortgagor, shall reconvey the mortgaged property to the mortgagor, or as he shall direct.

Forms of statutory transfer of mortgage in schedule.

27.—(1). A transfer of a statutory mortgage may be made by a deed expressed to be made by way of statutory transfer of mortgage, being in such one of the three forms (A.) and (B.) and (C.) given in Part II. of the Third Schedule to this Act as may be appropriate to the case, with such variations and additions, if any, as circumstances may require, and the provisions of this section shall apply thereto.

(2.) In whichever of those three forms the deed of transfer is made, it shall have effect as follows (namely) :

(i.) There shall become vested in the person to whom the benefit of the mortgage is expressed to be transferred, who, with his executors, administrators, and assigns, is hereafter in this section designated the transferee, the right to demand, sue for, recover, and give receipts for the mortgage money, or the unpaid part thereof, and the interest then due, if any, and thenceforth to become due thereon, and the benefit of all securities for the same, and the benefit of and the right to sue on all covenants with the mortgagee, and the right to exercise all powers of the mortgagee :

(ii.) All the estate and interest, subject to redemption, of the mortgagee in the mortgaged land shall vest in the transferee, subject to redemption.

(3.) If the deed of transfer is made in the form (B.), there shall also be deemed to be included, and there shall by virtue of this Act be implied therein, a covenant with the transferee by the person expressed to join therein as covenantor to the effect following (namely) :

That the covenantor will, on the next of the days by the mortgage deed fixed for payment of interest, pay to the transferee the stated mortgage money, or so much thereof as then remains unpaid, with interest thereon, or on the unpaid part thereof, in the meantime, at the rate stated in the mortgage deed ; and will thereafter, as long as the mortgage money, or any part thereof, remains unpaid, pay to the transferee interest on that sum, or the unpaid part thereof, at

44 & 45 Vict. c. 41.

the same rate, on the successive days by the mortgage deed fixed for payment of interest.

(4.) If the deed of transfer is made in the form (C.), it shall, by virtue of this Act, operate not only as a statutory transfer of mortgage, but also as a statutory mortgage, and the provisions of this section shall have effect in relation thereto, accordingly; but it shall not be liable to any increased stamp duty by reason only of its being designated a mortgage.

Implied covenants, joint and several.

28. In a deed of statutory mortgage, or of statutory transfer of mortgage, where more persons than one are expressed to convey as mortgagors, or to join as covenantors, the implied covenant on their part shall be deemed to be a joint and several covenant by them; and where there are more mortgagees or more transferees than one, the implied covenant with them shall be deemed to be a covenant with them jointly, unless the amount secured is expressed to be secured to them in shares or distinct sums, in which latter case the implied covenant with them shall be deemed to be a covenant with each severally in respect of the share or distinct sum secured to him.

Form of reconveyance of statutory mortgage in schedule.

29. A reconveyance of a statutory mortgage may be made by a deed expressed to be made by way of statutory reconveyance of mortgage, being in the form given in Part III. of the Third Schedule to this Act, with such variations and additions, if any, as circumstances may require.

VI.—Trust and Mortgage Estates on Death.

Devolution of trust and mortgage estates on death.

30.—(1.) (*f*) Where an estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal, is vested on any trust, or by way of mortgage, in any person solely, the same shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time, in like manner as if the same were a chattel real vesting in them or him; and accordingly all the like powers, for one only of several joint personal representatives, as well as for a single personal representative, and for all the personal representatives together, to dispose of and otherwise deal with the same, shall belong to the deceased's personal representatives or representative from time to time, with all the like incidents, but subject to all the like rights, equities, and obligations, as if the same were a chattel real vesting in them or him; and, for the purposes of this section, the personal representatives, for the time being, of the deceased, shall be deemed in law his heirs and assigns, within the meaning of all trusts and powers.

(*f*) See *ante*, pp. 210, 293. This section is printed as amended by the S. L. R. Act, 1894 (57 & 58 Vict. c. 56).

(3.) This section applies only in cases of death after the commencement of this Act. 44 & 45 Vict. c. 41.

VII.—Trustees and Executors.

31—38.—These sections were repealed by the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 51. See the following sections of the Trustee Act, 1893; ss. 10—12, as to appointment of new trustees set out, *post*, pp. 546—548; ss. 13—16, as to purchase and sale; ss. 17—24, as to various powers and liabilities of trustees and executors; ss. 25—41, as to appointment of new trustees by the Court and vesting orders. Sections 25, 26 and 23 are set out, *ante*, pp. 295, 296, 318. See, for further references, the Table of Statutes.

VIII.—Married Women.

Power for Court to bind interest of married woman (*g*).

39.—(1.) Notwithstanding that a married woman is restrained from anticipation, the Court may, if it thinks fit, where it appears to the Court to be for her benefit, by judgment or order, with her consent, bind her interest in any property.

(2.) This section applies only to judgments or orders made after the commencement of this Act.

Power of attorney of married woman (*h*).

40.—(1.) A married woman, whether an infant or not, shall by virtue of this Act have power, as if she was unmarried and of full age, by deed to appoint an attorney on her behalf for the purpose of executing any deed or doing any other act which she might herself execute or do; and the provisions of this Act relating to instruments creating powers of attorney shall apply thereto.

(2.) This section applies only to deeds executed after the commencement of this Act.

IX.—Infants.

Sales and leases on behalf of infant owner. 40 & 41 Vict. c. 18.

41. Where a person in his own right seised of or entitled to land for an estate in fee simple, or for any leasehold interest at a rent, is an infant, the land shall be deemed to be a settled estate within the Settled Estates Act, 1877.

Management of land and receipt and application of income during minority.

42.—(1.) If and as long as any person who would but for this section be beneficially entitled to the possession of any land is an infant, and being a woman is also unmarried, the trustees appointed for this purpose by the settlement, if any, or if there are none so appointed, then the persons, if any, who are for the time being under the settlement trustees with power of sale of the settled land, or of part thereof, or with power of consent to or approval of the exercise of such a power of

(*g*) See *ante*, p. 130, note (*q*).

(*h*) See *ante*, p. 317.

44 & 45 Vict. c. 41.

sale, or if there are none, then any persons appointed as trustees for this purpose by the Court, on the application of a guardian or next friend of the infant, may enter into and continue in possession of the land; and in every such case the subsequent provisions of this section shall apply.

(2.) The trustees shall manage or superintend the management of the land, with full power to fell timber or cut underwood from time to time in the usual course for sale, or for repairs or otherwise, and to erect, pull down, rebuild, and repair houses, and other buildings and erections, and to continue the working of mines, minerals, and quarries which have usually been worked, and to drain or otherwise improve the land or any part thereof, and to insure against loss by fire, and to make allowances to and arrangements with tenants and others, and to determine tenancies, and to accept surrenders of leases and tenancies, and generally to deal with the land in a proper and due course of management; but so that, where the infant is impeachable for waste, the trustees shall not commit waste, and shall cut timber on the same terms only, and subject to the same restrictions, on and subject to which the infant could, if of full age, cut the same.

(3.) The trustees may from time to time, out of the income of the land, including the produce of the sale of timber and underwood, pay the expenses incurred in the management, or in the exercise of any power conferred by this section, or otherwise in relation to the land, and all outgoings not payable by any tenant or other person, and shall keep down any annual sum, and the interest of any principal sum, charged on the land.

(4.) The trustees may apply at discretion any income which, in the exercise of such discretion, they deem proper, according to the infant's age, for his or her maintenance, education, or benefit, or pay thereout any money to the infant's parent or guardian, to be applied for the same purposes.

(5.) The trustees shall lay out the residue of the income of the land in investment on securities on which they are by the settlement, if any, or by law (*i*), authorized to invest trust money, with power to vary investments; and shall accumulate the income of the investments so made in the way of compound interest, by from time to time similarly investing such income and the resulting income of investments; and shall stand possessed of the accumulated fund arising from income of the land and from investments of income on the trusts following (namely):

(i.) If the infant attains the age of twenty-one years, then in trust for the infant;

(ii.) If the infant is a woman and marries while an infant, then in trust for her separate use, independently of her husband, and so that her receipt after she marries, and though still an infant, shall be a good discharge; but

(*i*) See the Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 1, *et seq.*

(iii.) If the infant dies while an infant, and being a woman without having been married, then, where the infant was, under a settlement, tenant for life, or by purchase tenant in tail or tail male or tail female, on the trusts, if any, declared of the accumulated fund by that settlement; but where no such trusts are declared, or the infant has taken the land from which the accumulated fund is derived by descent, and not by purchase, or the infant is tenant for an estate in fee simple, absolute or determinable, then in trust for the infant's personal representatives, as part of the infant's personal estate; 44 & 45 Vict. c. 41.

but the accumulations, or any part thereof, may at any time be applied as if the same were income arising in the then current year.

(6.) Where the infant's estate or interest is in an undivided share of land, the powers of this section relative to the land may be exercised jointly with persons entitled to possession of, or having power to act in relation to, the other undivided share or shares.

(7.) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(8.) This section applies only where that instrument comes into operation after the commencement of this Act.

Application by trustees of income of property of infant for maintenance, &c. (*k*)

43.—(1.) Where any property is held by trustees in trust for an infant, either for life, or for any greater interest, and whether absolutely, or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education, or benefit, the income of that property, or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education or not.

(2.) The trustees shall accumulate all the residue of that income in the way of compound interest, by investing the same and the resulting income thereof from time to time on securities on which they are by the settlement, if any, or by law, authorized to invest trust money, and shall hold those accumulations for the benefit of the person who ultimately becomes entitled to the property from which the same arise; but so that the trustees may at any time, if they think fit, apply those accumulations, or any part thereof, as if the same were income arising in the then current year.

(3.) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant

(*k*) See 2 K. & E. 436, note (*d*).

44 & 45 Vict. c. 41.

arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(4.) This section applies whether that instrument comes into operation before or after the commencement of this Act.

X.—Rentcharges and other Annual Sums.

Remedies for recovery of annual sums charged on land.

44.—(1.) Where a person is entitled to receive out of any land, or out of the income of any land, any annual sum, payable half-yearly or otherwise whether charged on the land or on the income of the land, and whether by way of rentcharge or otherwise, not being rent incident to a reversion, then, subject and without prejudice to all estates, interests, and rights having priority to the annual sum, the person entitled to receive the same shall have such remedies for recovering and compelling payment of the same as are described in this section, as far as those remedies might have been conferred by the instrument under which the annual sum arises, but not further.

(2.) If at any time the annual sum or any part thereof is unpaid for twenty-one days next after the time appointed for any payment in respect thereof, the person entitled to receive the annual sum may enter into and distrain on the land charged or any part thereof, and dispose according to law of any distress found, to the intent that thereby or otherwise the annual sum and all arrears thereof, and all costs and expenses occasioned by non-payment thereof, may be fully paid.

(3.) If at any time the annual sum or any part thereof is unpaid for forty days next after the time appointed for any payment in respect thereof, then, although no legal demand has been made for payment thereof, the person entitled to receive the annual sum may enter into possession of and hold the land charged or any part thereof, and take the income thereof, until thereby or otherwise the annual sum and all arrears thereof due at the time of his entry, or afterwards becoming due during his continuance in possession, and all costs and expenses occasioned by non-payment of the annual sum, are fully paid; and such possession when taken shall be without impeachment of waste.

(4.) In the like case the person entitled to the annual charge, whether taking possession or not, may also by deed demise the land charged, or any part thereof, to a trustee for a term of years, with or without impeachment of waste, on trust, by mortgage, or sale, or demise, for all or any part of the term, of the land charged, or of any part thereof, or by receipt of the income thereof, or by all or any of those means, or by any other reasonable means, to raise and pay the annual sum and all arrears thereof due or to become due, and all costs and expenses occasioned by non-payment of the annual sum, or incurred in compelling or obtaining payment thereof, or otherwise relating thereto, including the costs of the preparation and execution of the deed of demise, and

the costs of the execution of the trusts of that deed ; and the surplus, if any, of the money raised, or of the income received, under the trusts of that deed shall be paid to the person for the time being entitled to the land therein comprised in reversion immediately expectant on the term thereby created.

(5.) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the annual sum arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(6.) This section applies only where that instrument comes into operation after the commencement of this Act.

Redemption of quit rents and other perpetual charges.

45.—(1.) Where there is quit rent, chief rent, rentcharge, or other annual sum issuing out of land (in this section referred to as the rent) the Copyhold Commissioners (*l*) shall at any time, on the requisition of the owner of the land, or of any person interested therein, certify the amount of money in consideration whereof the rent may be redeemed.

(2.) Where the person entitled to the rent is absolutely entitled thereto in fee simple in possession, or is empowered to dispose thereof absolutely, or to give an absolute discharge for the capital value thereof, the owner of the land, or any person interested therein, may, after serving one month's notice on the person entitled to the rent, pay or tender to that person the amount certified by the Commissioners.

(3.) On proof to the Commissioners that payment or tender has been so made, they shall certify that the rent is redeemed under this Act ; and that certificate shall be final and conclusive, and the land shall be thereby absolutely freed and discharged from the rent.

(4.) Every requisition under this section shall be in writing ; and every certificate under this section shall be in writing, sealed with the seal of the Commissioners.

(5.) This section does not apply to tithe rentcharge, or to a rent reserved on a sale or lease, or to a rent made payable under a grant or licence for building purposes, or to any sum or payment issuing out of land not being perpetual.

(6.) This section applies to rents payable at, or created after, the commencement of this Act.

(7.) This section does not extend to Ireland.

XI.—Powers of Attorney (*m*).

Execution under power of attorney.

46.—(1.) The donee of a power of attorney may, if he thinks fit, execute, or do any assurance, instrument, or thing in and with his own name and signature and his own seal, where sealing is required,

(*l*) Now the Board of Agriculture, see *ante*, p. 54, note (*y*).

(*m*) See further, provisions as to powers of attorney in the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), ss. 8 and 9, *post*, pp. 492, 493 ; and *ante*, pp. 316—318.

44 & 45 Vict. c. 41.

by the authority of the donor of the power; and every assurance, instrument, and thing so executed and done shall be as effectual in law, to all intents, as if it had been executed or done by the donee of the power in the name and with the signature and seal of the donor thereof.

(2.) This section applies to powers of attorney created by instruments executed either before or after the commencement of this Act.

Payment by attorney under power without notice of death, &c., good (*n*).

47.—(1.) Any person making or doing any payment or act, in good faith, in pursuance of a power of attorney, shall not be liable in respect of the payment or act by reason that before the payment or act the donor of the power had died or become lunatic, of unsound mind, or bankrupt, or had revoked the power, if the fact of death, lunacy, unsoundness of mind, bankruptcy, or revocation was not at the time of the payment or act known to the person making or doing the same.

(2.) But this section shall not affect any right against the payee of any person interested in any money so paid; and that person shall have the like remedy against the payee as he would have had against the payer if the payment had not been made by him.

(3.) This section applies only to payments and acts made and done after the commencement of this Act.

Deposit of original instruments creating powers of attorney.

48.—(1.) An instrument creating a power of attorney, its execution being verified by affidavit, statutory declaration, or other sufficient evidence, may, with the affidavit or declaration, if any, be deposited in the Central Office of the Supreme Court of Judicature.

(2.) A separate file of instruments so deposited shall be kept, and any person may search that file, and inspect every instrument so deposited, and an office copy thereof shall be delivered out to him on request.

(3.) A copy of an instrument so deposited may be presented at the office, and may be stamped or marked as an office copy, and when so stamped or marked shall become and be an office copy.

(4.) An office copy of an instrument so deposited shall without further proof be sufficient evidence of the contents of the instrument and of the deposit thereof in the Central Office.

(5.) General Rules may be made for purposes of this section, regulating the practice of the Central Office, and prescribing, with the concurrence of the Commissioners of Her Majesty's Treasury, the fees to be taken therein.

(6.) This section applies to instruments creating powers of attorney executed either before or after the commencement of this Act.

XII.—Construction and Effect of Deeds and other Instruments.

Use of word grant unnecessary (*o*).

49.—(1.) It is hereby declared that the use of the word grant is not

(*n*) See *ante*, p. 318.

(*o*) See *ante*, p. 86.

necessary in order to convey tenements or hereditaments, corporeal or incorporeal. 44 & 45 Vict. c. 41.

(2.) This section applies to conveyances made before or after the commencement of this Act.

Conveyance by a person to himself, &c. (*p*)

50.—(1.) Freehold land, or a thing in action, may be conveyed by a person to himself jointly (*q*) with another person, by the like means by which it might be conveyed by him to another person; and may, in like manner, be conveyed by a husband to his wife, and by a wife to her husband, alone or jointly with another person.

(2.) This section applies only to conveyances made after the commencement of this Act.

Words of limitation in fee or in tail (*r*).

51.—(1.) In a deed it shall be sufficient, in the limitation of an estate in fee simple, to use the words in fee simple, without the word heirs; and in the limitation of an estate in tail, to use the words in tail without the words heirs of the body; and in the limitation of an estate in tail male or in tail female, to use the words in tail male, or in tail female, as the case requires, without the words heirs male of the body, or heirs female of the body.

(2.) This section applies only to deeds executed after the commencement of this Act.

Powers simply collateral (*s*).

52.—(1.) A person to whom any power, whether coupled with an interest or not, is given, may by deed release, or contract not to exercise, the power.

(2.) This section applies to powers created by instruments coming into operation either before or after the commencement of this Act.

Construction of supplemental or annexed deed.

53.—(1.) A deed expressed to be supplemental to a previous deed, or directed to be read as an annex thereto, shall, as far as may be, be read and have effect as if the deed so expressed or directed were made by way of indorsement on the previous deed, or contained a full recital thereof.

(2.) This section applies to deeds executed either before or after the commencement of this Act.

Receipt in deed sufficient.

54.—(1.) A receipt for consideration money or securities in the body of a deed shall be a sufficient discharge for the same to the person paying or delivering the same, without any further receipt for the same being indorsed on the deed.

(2.) This section applies only to deeds executed after the commencement of this Act.

Receipt in deed or indorsed, evidence for subsequent purchaser.

55.—(1.) A receipt for consideration money or other consideration in the body of a deed or indorsed thereon shall, in favour of a subsequent purchaser, not having notice that the money or other consideration thereby acknowledged to be received was not in fact paid or given,

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(*p*) See *ante*, p. 279.

(*q*) This section does not enable A. to convey land to be held in common by himself and B.

(*r*) See *ante*, pp. 84, 257, 265.

(*s*) See *ante*, p. 310, note (*q*).

44 & 45 Vict. c. 41.

wholly or in part, be sufficient evidence of the payment or giving of the whole amount thereof.

(2.) This section applies only to deeds executed after the commencement of this Act.

Receipt in deed or indorsed, authority for payment to solicitor.

56.—(1.) Where a solicitor produces a deed, having in the body thereof or indorsed thereon a receipt for consideration money or other consideration, the deed being executed, or the indorsed receipt being signed, by the person entitled to give a receipt for that consideration, the deed shall be sufficient authority to the person liable to pay or give the same for his paying or giving the same to the solicitor, without the solicitor producing any separate or other direction or authority in that behalf from the person who executed or signed the deed or receipt.

(2.) This section applies only in cases where consideration is to be paid or given after the commencement of this Act.

Sufficiency of forms in Fourth Schedule.

57. Deeds in the form of and using the expressions in the Forms given in the Fourth Schedule to this Act, or in the like form or using expressions to the like effect, shall as regards form and expression in relation to the provisions of this Act, be sufficient.

Covenants to bind heirs, &c. (*t*)

58.—(1.) A covenant relating to land of inheritance, or devolving on the heir as special occupant, shall be deemed to be made with the covenantee, his heirs and assigns, and shall have effect as if heirs and assigns were expressed.

(2.) A covenant relating to land not of inheritance, or not devolving on the heir as special occupant, shall be deemed to be made with the covenantee, his executors, administrators, and assigns, and shall have effect as if executors, administrators, and assigns, were expressed.

(3.) This section applies only to covenants made after the commencement of this Act.

Covenants to extend to heirs, &c.

59.—(1.) A covenant, and a contract under seal, and a bond or obligation under seal, though not expressed to bind the heirs, shall operate in law to bind the heirs and real estate, as well as the executors and administrators and personal estate, of the person making the same, as if heirs (*u*) were expressed.

(2.) This section extends to a covenant implied by virtue of this Act.

(3.) This section applies only if and as far as a contrary intention is not expressed in the covenant, contract, bond, or obligation, and shall have effect subject to the terms of the covenant, contract, bond, or obligation, and to the provisions therein contained.

(4.) This section applies only to a covenant, contract, bond, or obligation made or implied after the commencement of this Act.

Effect of covenant with

60.—(1.) A covenant, and a contract under seal, and a bond or obligation under seal, made with two or more jointly, to pay money or to

(*t*) As to when assigns' must be expressly mentioned, see *ante*, pp. 167, 168, note (*p*), 170.

(*u*) See *ante*, p. 170, note (*s*).

make a conveyance, or to do any other act, to them or for their benefit, shall be deemed to include, and shall, by virtue of this Act, imply, an obligation to do the act to, or for the benefit of, the survivor or survivors of them, and to, or for the benefit of, any other person to whom the right to sue on the covenant, contract, bond, or obligation devolves.

two or more jointly (*x*).

(2.) This section extends to a covenant implied by virtue of this Act.

(3.) This section applies only if and as far as a contrary intention is not expressed in the covenant, contract, bond, or obligation, and shall have effect subject to the covenant, contract, bond, or obligation, and to the provisions therein contained.

(4.) This section applies only to a covenant, contract, bond, or obligation made or implied after the commencement of this Act.

Effect of advance on joint account, &c. (*y*)

61.—(1.) Where in a mortgage, or an obligation for payment of money, or a transfer of a mortgage or of such an obligation, the sum, or any part of the sum, advanced or owing is expressed to be advanced by or owing to more persons than one out of money, or as money, belonging to them on a joint account, or a mortgage, or such an obligation, or such a transfer is made to more persons than one, jointly, and not in shares, the mortgage money, or other money, or money's worth for the time being due to those persons on the mortgage or obligation, shall be deemed to be and remain money or money's worth belonging to those persons on a joint account, as between them and the mortgagor or obligor; and the receipt in writing of the survivors or last survivor of them, or of the personal representatives of the last survivor, shall be a complete discharge for all money or money's worth for the time being due, notwithstanding any notice to the payer of a severance of the joint account.

(2.) This section applies only if and as far as a contrary intention is not expressed in the mortgage, or obligation, or transfer, and shall have effect subject to the terms of the mortgage, or obligation, or transfer, and to the provisions therein contained.

(3.) This section applies only to a mortgage, or obligation, or transfer made after the commencement of this Act.

Grants of easements, &c., by way of use (*z*).

62.—(1.) A conveyance of freehold land to the use that any person may have, for an estate or interest not exceeding in duration the estate conveyed in the land, any easement, right, liberty, or privilege in, or over, or with respect to that land, or any part thereof, shall operate to vest in possession in that person that easement, right, liberty, or privilege, for the estate or interest expressed to be limited to him; and he, and the persons deriving title under him, shall have, use, and enjoy the same accordingly.

(2.) This section applies only to conveyances made after the commencement of this Act.

(*x*) See ss. 58 and 59, *supra*.

(*y*) See Elph. Introd. 151.

(*z*) See *ante*, pp. 344, 345.

44 & 45 Vict. c. 41.

Provision for all the estate, &c. (*a*)

63.—(1.) Every conveyance shall, by virtue of this Act, be effectual to pass all the estate, right, title, interest, claim, and demand which the conveying parties respectively have, in, to, or on the property conveyed, or expressed or intended so to be, or which they respectively have power to convey in, to, or on the same.

(2.) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and shall have effect subject to the terms of the conveyance and to the provisions therein contained.

(3.) This section applies only to conveyances made after the commencement of this Act.

Construction of implied covenants.

64. In the construction of a covenant or proviso, or other provision, implied in a deed by virtue of this Act, words importing the singular or plural number, or the masculine gender, shall be read as also importing the plural or singular number, or as extending to females, as the case may require.

XIII.—Long Terms.

Enlargement of residue of long term into fee simple (*b*).

65.—(1.) Where a residue unexpired of not less than two hundred years of a term, which, as originally created, was for not less than three hundred years, is subsisting in land, whether being the whole land originally comprised in the term, or part only thereof, without any trust, or right of redemption affecting the term in favour of the freeholder, or other person entitled in reversion expectant on the term, and without any rent, or with merely a peppercorn rent or other rent having no money value, incident to the reversion, or having had a rent, not being merely a peppercorn rent or other rent having no money value (*c*) originally so incident, which subsequently has been released, or has become barred by lapse of time, or has in any other way ceased to be payable, then the term may be enlarged into a fee simple in the manner, and subject to the restrictions, in this section provided.

(2.) Each of the following persons (namely):

(i.) Any person beneficially entitled in right of the term, whether subject to any incumbrance or not, to possession of any land comprised in the term; but, in case of a married woman, with the concurrence of her husband, unless she is entitled for her separate use, whether with restraint on anticipation or not, and then without his concurrence;

(ii.) Any person being in receipt of income as trustee, in right of the term, or having the term vested in him in trust, for sale, whether subject to any incumbrance or not;

(*a*) See Elph. N. & C. Interp. 204, *et seq.*; Elph. Introd. 96.

(*b*) See the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 11, *post*, p. 493.

(*c*) See *ante*, p. 185, note (*e*).

(iii.) Any person in whom, as personal representative of any deceased person, the term is vested, whether subject to any incumbrance or not ;

shall, as far as regards the land to which he is entitled, or in which he is interested, in right of the term, in any such character as aforesaid, have power by deed to declare to the effect that, from and after the execution of the deed, the term shall be enlarged into a fee simple.

(3.) Thereupon, by virtue of the deed and of this Act, the term shall become and be enlarged accordingly, and the person in whom the term was previously vested shall acquire and have in the land a fee simple instead of the term.

(4.) The estate in fee simple so acquired by enlargement shall be subject to all the same trusts, powers, executory limitations over, rights, and equities, and to all the same covenants, and provisions relating to user and enjoyment, and to all the same obligations of every kind, as the term would have been subject to if it had not been so enlarged.

(5.) But where any land so held for the residue of a term has been settled in trust by reference to other land, being freehold land, so as to go along with that other land as far as the law permits, and, at the time of enlargement, the ultimate beneficial interest in the term, whether subject to any subsisting particular estate or not, has not become absolutely and indefeasibly vested in any person, then the estate in fee simple acquired as aforesaid shall, without prejudice to any conveyance for value previously made by a person having a contingent or defeasible interest in the term, be liable to be, and shall be, conveyed and settled in like manner as the other land, being freehold land, aforesaid, and until so conveyed and settled shall devolve beneficially as if it had been so conveyed and settled.

(6.) The estate in fee simple so acquired shall, whether the term was originally created without impeachment of waste or not, include the fee simple in all mines and minerals which at the time of enlargement have not been severed in right, or in fact, or have not been severed or reserved by an inclosure Act or award.

(7.) This section applies to every such term as aforesaid subsisting at or after the commencement of this Act.

XIV.—Adoption of Act.

Protection of solicitor and trustees adopting Act.

66.—(1.) It is hereby declared that the powers given by this Act to any person, and the covenants, provisions, stipulations, and words which under this Act are to be deemed included or implied in any instrument, or are by this Act made applicable to any contract for sale or other transaction, are and shall be deemed in law proper powers, covenants, provisions, stipulations, and words, to be given by or to be

44 & 45 Vict. c. 41.

contained in any such instrument, or to be adopted in connexion with, or applied to, any such contract or transaction; and a solicitor shall not be deemed guilty of neglect or breach of duty, or become in any way liable, by reason of his omitting, in good faith, in any such instrument, or in connexion with any such contract or transaction, to negative the giving, inclusion, implication, or application of any of those powers, covenants, provisions, stipulations, or words, or to insert or apply any others in place thereof, in any case where the provisions of this Act would allow of his doing so.

(2.) But nothing in this Act shall be taken to imply that the insertion in any such instrument, or the adoption in connexion with, or the application to, any contract or transaction, of any further or other powers, covenants, provisions, stipulations, or words is improper.

(3.) Where the solicitor is acting for trustees, executors, or other persons in a fiduciary position, those persons shall also be protected in like manner.

(4.) Where such persons are acting without a solicitor, they shall also be protected in like manner.

XV.—Miscellaneous.

Regulations respecting notice.

67.—(1.) Any notice required or authorized by this Act to be served shall be in writing.

(2.) Any notice required or authorized by this Act to be served on a lessor or mortgagor shall be sufficient, although only addressed to the lessee or mortgagor by that designation, without his name, or generally to the persons interested, without any name, and notwithstanding that any person to be affected by the notice is absent, under disability, unborn, or unascertained.

(3.) Any notice required or authorized by this Act to be served shall be sufficiently served if it is left at the last-known place of abode or business in the United Kingdom of the lessee, lessor, mortgagee, mortgagor, or other person to be served, or, in case of a notice required or authorized to be served on a lessee or mortgagor, is affixed or left for him on the land or any house or building comprised in the lease or mortgage, or, in case of a mining lease, is left for the lessee at the office or counting-house of the mine.

(4.) Any notice required or authorized by this Act to be served shall also be sufficiently served, if it is sent by post in a registered letter addressed to the lessee, lessor, mortgagee, mortgagor, or other person to be served, by name, at the aforesaid place of abode or business, office, or counting-house, and if that letter is not returned through the post-office undelivered; and that service shall be deemed to be made at the time at which the registered letter would in the ordinary course be delivered.

(5.) This section does not apply to notices served in proceedings in the Court. 44 & 45 Vict. c. 41.

68. Repealed by the S. L. R. Act, 1894 (57 & 58 Vict. c. 56).

XVI.—Court ; Procedure ; Orders.

Regulations respecting payments into Court and applications (*d*).

69.—(1.) All matters within the jurisdiction of the Court under this Act shall, subject to the Acts regulating the Court, be assigned to the Chancery Division of the Court.

(2.) Payment of money into Court shall effectually exonerate therefrom the person making the payment.

(3.) Every application to the Court shall, except where it is otherwise expressed, be by summons at Chambers.

(4.) On an application by a purchaser notice shall be served in the first instance on the vendor.

(5.) On an application by a vendor notice shall be served in the first instance on the purchaser.

(6.) On any application notice shall be served on such persons, if any, as the Court thinks fit.

(7.) The Court shall have full power and discretion to make such order as it thinks fit respecting the costs, charges, or expenses of all or any of the parties to any application.

39 & 40 Vict. c. 59, s. 17.

(8.) General rules for purposes of this Act shall be deemed Rules of Court within section seventeen of the Appellate Jurisdiction Act, 1876, and may be made accordingly.

(9.) The powers of the Court may, as regards land in the County Palatine of Lancaster, be exercised also by the Court of Chancery of the County Palatine ; and Rules for regulating proceedings in that Court shall be from time to time made by the Chancellor of the Duchy of Lancaster, with the advice and consent of a judge of the High Court acting in the Chancery Division, and of the Vice-Chancellor of the County Palatine.

Orders of Court conclusive.

70.—(1.) An order of the Court under any statutory or other jurisdiction shall not as against a purchaser, be invalidated on the ground of want of jurisdiction, or of want of any concurrence, consent, notice, or service, whether the purchaser has notice of any such want or not.

(2.) (*e*) This section shall have effect with respect to any lease, sale, or other act under the authority of the Court, and purporting to be in pursuance of the Settled Estates Act, 1877, or to be in pursuance of any former Act repealed by that Act, notwithstanding any exception in such former Act.

40 & 41 Vict. c. 18.

(*d*) This section is printed as amended by the S. L. R. Act, 1894 (57 & 58 Vict. c. 56).

(*e*) This sub-section is printed as amended by the S. L. R. Act, 1894 (57 & 58 Vict. c. 56).

44 & 45 Vict. c. 41.

(3.) This section applies to all orders made before or after the commencement of this Act, except any order which has before the commencement of this Act been set aside or determined to be invalid on any ground, and except any order as regards which an action or proceeding is at the commencement of this Act pending for having it set aside or determined to be invalid.

XVII.—Repeals.

71. Repealed. See the S. L. R. Act, 1894 (57 & 58 Vict. c. 56).

XVIII.—Ireland.

Modifications respecting Ireland.

72.—(1.) In the application of this Act to Ireland the foregoing provisions shall be modified as in this section provided.

(2.) The Court shall be Her Majesty's High Court of Justice in Ireland.

(3.) All matters within the jurisdiction of that Court shall, subject to the Acts regulating that Court, be assigned to the Chancery Division of that Court; but general rules under this Act may direct that any of those matters be assigned to the Land Judges of that Division.

(4.) The proper office of the Supreme Court of Judicature in Ireland shall be substituted for the Central Office of the Supreme Court of Judicature.

40 & 41 Vict. c. 57, s. 69.

(5.) General Rules for purposes of this Act for Ireland shall be deemed Rules of Court within the Supreme Court of Judicature Act (Ireland), 1877, and may be made accordingly (*f*).

Death of bare trustee, intestate, &c. 37 & 38 Vict. c. 78 (*g*).

73.—(1.) Section five of the Vendor and Purchaser Act, 1874, is hereby repealed from and after the commencement of this Act, as regards cases of death thereafter happening; and section seven of the Vendor and Purchaser Act, 1874, is hereby repealed as from the date at which it came into operation.

(2.) This section extends to Ireland only.

(*f*) Printed as amended by the S. L. R. Act, 1894 (57 & 58 Vict. c. 56).

(*g*) As to the meaning of a "bare trustee," see *ante*, p. 293, note (*l*).

SCHEDULES (*h*).

THE FIRST SCHEDULE.

ACTS AFFECTED.

PART I.

& 2 Vict. c. 110.—An Act for abolishing arrest on mesne process in civil actions except in certain cases; for extending the remedies of creditors against the property of debtors; and for amending the laws for the relief of insolvent debtors in England.

2 & 3 Vict. c. 11.—An Act for the better protection of purchasers against judgments, Crown debts, lis pendens, and flats in bankruptcy.

18 & 19 Vict. c. 15.—An Act for the better protection of purchasers against judgments, Crown debts, cases of lis pendens, and life annuities or rentcharges.

22 & 23 Vict. c. 35.—An Act to further amend the law of property and to relieve trustees.

23 & 24 Vict. c. 38.—An Act to further amend the law of property.

23 & 24 Vict. c. 115.—An Act to simplify and amend the practice as to the entry of satisfaction on Crown debts and on judgments.

27 & 28 Vict. c. 112.—An Act to amend the law relating to future judgments, statutes, and recognizances.

28 & 29 Vict. c. 104.—The Crown Suits, &c., Act, 1865.

31 & 32 Vict. c. 54.—The Judgments Extension Act, 1868.

THE THIRD SCHEDULE.

STATUTORY MORTGAGE.

PART I.

Deed of Statutory Mortgage.

THIS INDENTURE made by way of statutory mortgage the day of 1882 between *A.* of [*&c.*] of the one part and *M.* of [*&c.*] of the other part WITNESSETH that in consideration of the sum of £ now paid to *A.* by *M.* of which sum *A.* hereby acknowledges the receipt *A.* as mortgagor and as beneficial owner hereby conveys to *M.* All that [*&c.*] To hold to and to the use of *M.* in fee simple for securing payment on the day of 1883 of the principal sum of £ as the mortgage money with interest thereon at the rate of [*four*] per centum per annum.

In witness, &c.

*** *Variations in this and subsequent forms to be made, if required, for leasehold land, or other matter.*

(*h*) The first and second schedules were repealed by the S. L. R. Act, 1894 (57 & 58 Vict. c. 56); but see s. 1 of that Act and the Conveyancing Act, 1882, s. 2, *post*, p. 488.

44 & 45 Vict. c. 41.

PART II.

(A.)

Deed of Statutory Transfer, Mortgagor not joining.

THIS INDENTURE made by way of statutory transfer of mortgage the day of 1883 between *M.* of [*&c.*] of the one part and *T.* of [*&c.*] of the other part supplemental to an indenture made by way of statutory mortgage dated the day of 1882 and made between [*&c.*] WITNESSETH that in consideration of the sum of £ now paid to *M.* by *T.* being the aggregate amount of £ mortgage money and £ interest due in respect of the said mortgage of which sum *M.* hereby acknowledges the receipt *M.* as mortgagee hereby conveys and transfers to *T.* the benefit of the said mortgage.

In witness, &c.

(B.)

Deed of Statutory Transfer, a Covenantor joining.

THIS INDENTURE made by way of statutory transfer of mortgage the day of 1883 between *A.* of [*&c.*] of the first part *B.* of [*&c.*] of the second part and *C.* of [*&c.*] of the third part supplemental to an indenture made by way of statutory mortgage dated the day of 1882 and made between [*&c.*] WITNESSETH that in consideration of the sum of £ now paid to *A.* by *C.* being the mortgage money due in respect of the said mortgage no interest being now due and payable thereon of which sum *A.* hereby acknowledges the receipt *A.* as mortgagee with the concurrence of *B.* who joins herein as covenantor hereby conveys and transfers to *C.* the benefit of the said mortgage.

In witness, &c.

(C.)

Statutory Transfer and Statutory Mortgage combined.

THIS INDENTURE made by way of statutory transfer of mortgage and statutory mortgage the day of 1883 between *A.* of [*&c.*] of the first part *B.* of [*&c.*] of the second part and *C.* of [*&c.*] of the third part supplemental to an indenture made by way of statutory mortgage dated the day of 1882 and made between [*&c.*] WHEREAS the principal sum of £ only remains due in respect of the said mortgage as the mortgage money and no interest is now due and payable thereon AND WHEREAS *B.* is seised in fee simple of the land comprised in the said mortgage subject to that mortgage NOW THIS INDENTURE WITNESSETH that in consideration of the sum of £ now paid to *A.* by *C.* of which sum *A.* hereby acknowledges the receipt and *B.* hereby acknowledges the payment and receipt as aforesaid* *A.* as mortgagee hereby conveys and transfers to *C.* the benefit of the said mortgage AND THIS INDENTURE ALSO WITNESSETH that for the same consideration *A.* as mortgagee and according to his estate and by direction of *B.* hereby conveys and *B.* as beneficial owner hereby conveys and confirms to *C.* All that [*&c.*] To hold to and to the use of *C.* in fee simple for securing payment on the day of 1882 of† the sum of £ as the mortgage money with interest thereon at the rate of [*four*] per centum per annum.

In witness, &c.

[*Or, in case of further advance, after* aforesaid *at* * *insert* and also in considera-

tion of the further sum of £ now paid by *C.* to *B.* of which sum *B.* hereby acknowledges the receipt, *and after* of *at* † *insert* the sums of £ and £ making together]

*** *Variations to be made, as required, in case of the deed being made by indorsement, or in respect of any other thing.*

PART III.

Deed of Statutory Re-conveyance of Mortgage.

THIS INDENTURE made by way of statutory re-conveyance of mortgage the day of 1884 between *C.* of [*&c.*] of the one part and *B.* of [*&c.*] of the other part supplemental to an indenture made by way of statutory transfer of mortgage dated the day of 1883 and made between [*&c.*] WITNESSETH that in consideration of all principal money and interest due under that indenture having been paid of which principal and interest *C.* hereby acknowledges the receipt *C.* as mortgagee hereby conveys to *B.* all the lands and hereditaments now vested in *C.* under the said indenture To hold to and to the use of *B.* in fee simple discharged from all principal money and interest secured by and from all claims and demands under the said indenture.

In witness, &c.

*** *Variations as noted above.*

THE FOURTH SCHEDULE.

SHORT FORMS OF DEEDS.

I.—*Mortgage.*

THIS INDENTURE OF MORTGAGE made the day of 1882 between *A.* of [*&c.*] of the one part and *B.* of [*&c.*] and *C.* of [*&c.*] of the other part WITNESSETH that in consideration of the sum of £ paid to *A.* by *B.* and *C.* out of money belonging to them on a joint account of which sum *A.* hereby acknowledges the receipt *A.* hereby covenants with *B.* and *C.* to pay to them on the day of 1882 the sum of £ with interest thereon in the meantime at the rate of [*four*] per centum per annum and also as long after that day as any principal money remains due under this mortgage to pay to *B.* and *C.* interest thereon at the same rate by equal half-yearly payments on the day of and the day of AND THIS INDENTURE ALSO WITNESSETH that for the same consideration *A.* as beneficial owner hereby conveys to *B.* and *C.* All that [*&c.*] To hold to and to the use of *B.* and *C.* in fee simple subject to the proviso for redemption following (namely) that if *A.* or any person claiming under him shall on the day of 1882 pay to *B.* and *C.* the sum of £ and interest thereon at the rate aforesaid then *B.* and *C.* or the persons claiming under them will at the request and cost of *A.* or the persons claiming under him re-convey the premises to *A.* or the persons claiming under him AND *A.* hereby covenants with *B.* as follows [*here add covenant as to fire insurance or other special covenant required*].

In witness, &c.

II.—*Further Charge.*

THIS INDENTURE made the day of 18 between [*the same parties as the foregoing mortgage*] and supplemental to an indenture of mortgage

44 & 45 Vict. c. 41.

dated the day of 18 and made between the same parties for securing the sum of £ and interest at [*four*] per centum per annum on property at [*&c.*] WITNESSETH that in consideration of the further sum of £ paid to *A.* by *B.* and *C.* out of money belonging to them on a joint account [*add receipt and covenant as in the foregoing mortgage*] and further that all the property comprised in the before-mentioned indenture of mortgage shall stand charged with the payment to *B.* and *C.* of the sum of £ and the interest thereon hereinbefore covenanted to be paid as well as the sum of £ and interest secured by the same indenture.

In witness, &c.

III.—*Conveyance on Sale.*

THIS INDENTURE made the day of 1883 between *A.* of [*&c.*] of the 1st part *B.* of [*&c.*] and *C.* of [*&c.*] of the 2nd part and *M.* of [*&c.*] of the 3rd part WHEREAS by an indenture dated [*&c.*] and made between [*&c.*] the lands hereinafter mentioned were conveyed by *A.* to *B.* and *C.* in fee simple by way of mortgage for securing £ and interest and by a supplemental indenture dated [*&c.*] and made between the same parties those lands were charged by *A.* with the payment to *B.* and *C.* of the further sum of £ and interest thereon AND WHEREAS a principal sum of £ remains due under the two before-mentioned indentures but all interest thereon has been paid as *B.* and *C.* hereby acknowledge NOW THIS INDENTURE WITNESSETH that in consideration of the sum of £ paid by the direction of *A.* to *B.* and *C.* and of the sum of £ paid to *A.* those two sums making together the total sum of £ paid by *M.* for the purchase of the fee simple of the lands hereinafter mentioned of which sum of £ *B.* and *C.* hereby acknowledge the receipt and of which total sum of £ *A.* hereby acknowledges the payment and receipt in manner before-mentioned *B.* and *C.* as mortgagees and by the direction of *A.* as beneficial owner hereby convey and *A.* as beneficial owner hereby conveys and confirms to *M.* All that [*&c.*] To hold to and to the use of *M.* in fee simple discharged from all money secured by and from all claims under the before-mentioned indentures [*Add, if required,* And *A.* hereby acknowledges the right of *M.* to production of the documents of title mentioned in the Schedule hereto and to delivery of copies thereof and hereby undertakes for the safe custody thereof].

In witness, &c.

[The Schedule above referred to.

To contain list of documents retained by A.]

IV.—*Marriage Settlement.*

THIS INDENTURE made the day of 1882 between *John M.* of [*&c.*] of the 1st part *Jane S.* of [*&c.*] of the 2nd part and *X.* of [*&c.*] and *Y.* of [*&c.*] of the 3rd part WITNESSETH that in consideration of the intended marriage between *John M.* and *Jane S. John M.* as settlor hereby conveys to *X.* and *Y.* All that [*&c.*] To hold to *X.* and *Y.* in fee simple to the use of *John M.* in fee simple until the marriage and after the marriage to the use of *John M.* during his life without impeachment of waste with remainder after his death to the use that *Jane S.* if she survives him may receive during the rest of her life a yearly jointure rentcharge of £ to commence from his death and to be paid by equal half-yearly payments the first thereof to be made at the end of six calendar months from his death if she is then living or if not a proportional part to be paid at her death and subject to the before-mentioned rentcharge to the use of *X.* and *Y.* for a term of five hundred years without impeachment of waste on the trusts hereinafter declared and subject thereto to the use of the first and other sons of

John M. and *Jane S.* successively according to seniority in tail male with remainder [*insert here, if thought desirable,* to the use of the same first and other sons successively according to seniority in tail with remainder] to the use of all the daughters of *John M.* and *Jane S.* in equal shares as tenants in common in tail with cross remainders between them in tail with remainder to the use of *John M.* in fee simple [*Insert trusts of term of 500 years for raising portions; also, if required, power to charge jointure and portions on a future marriage; also powers of sale, exchange, and partition, and other powers and provisions, if and as desired*]. 44 & 45 Vict. c. 41.

In witness, &c.

THE CONVEYANCING ACT, 1882. 45 & 46 Vict. c. 39.

[45 & 46 VICT. CH. 39.]

An Act for further improving the Practice of Conveyancing; and for other Purposes. [10th August, 1882.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows:

Preliminary.

1.—(1.) This Act may be cited as the Conveyancing Act, 1882; and the Conveyancing and Law of Property Act, 1881 (in this Act referred to as the Conveyancing Act of 1881), and this Act may be cited together as the Conveyancing Acts, 1881, 1882. Short titles; commencement; extent; interpretation. 44 & 45 Vict. c. 41.

(2.) This Act, except where it is otherwise expressed, shall commence and take effect from and immediately after the thirty-first day of December one thousand eight hundred and eighty-two, which time is in this Act referred to as the commencement of this Act.

(3.) This Act does not extend to Scotland.

(4.) In this Act and in the Schedule thereto—

(i.) Property includes real and personal property, and any debt, and any thing in action, and any other right or interest in the nature of property, whether in possession or not;

(ii.) Purchaser includes a lessee or mortgagee, or an intending purchaser, lessee, or mortgagee, or other person, who, for valuable consideration, takes or deals for property, and purchase has a meaning corresponding with that of purchaser;

(iii.) The Act of the session of the third and fourth years of King William the Fourth (chapter seventy-four) "for the abolition of "Fines and Recoveries, and for the substitution of more simple 3 & 4 Will. IV. c. 74.

45 & 46 Vict. c. 39.

4 & 5 Will. IV. c. 92.

"modes of Assurance" is referred to as the Fines and Recoveries Act; and the Act of the session of the fourth and fifth years of King William the Fourth (chapter ninety-two) "for the abolition "of Fines and Recoveries, and for the substitution of more simple "modes of Assurance in Ireland" is referred to as the Fines and Recoveries (Ireland) Act.

Searches (*i*).

Official negative and other certificates of searches for judgments, Crown debts, &c.

2.—(1.) Where any person requires, for purposes of this section, search to be made in the Central Office of the Supreme Court of Judicature for entries of judgments, deeds, or other matters or documents, whereof entries are required or allowed to be made in that office by any Act described in Part I. of the First Schedule to the Conveyancing Act of 1881, or by any other Act, he may deliver in the office a requisition in that behalf, referring to this section.

(2.) Thereupon the proper officer shall diligently make the search required, and shall make and file in the office a certificate setting forth the result thereof; and office copies of that certificate shall be issued on requisition, and an office copy shall be evidence of the certificate.

(3.) In favour of a purchaser, as against persons interested under or in respect of judgments, deeds, or other matters or documents, whereof entries are required or allowed as aforesaid, the certificate, according to the tenour thereof, shall be conclusive, affirmatively or negatively, as the case may be.

(4.) Every requisition under this section shall be in writing, signed by the person making the same, specifying the name against which he desires search to be made, or in relation to which he requires an office copy certificate of result of search, and other sufficient particulars; and the person making any such requisition shall not be entitled to a search, or an office copy certificate, until he has satisfied the proper officer that the same is required for the purposes of this section.

(5.) General Rules shall be made for purposes of this section, prescribing forms and contents of requisitions and certificates, and regulating the practice of the office, and prescribing, with the concurrence of the Commissioners of Her Majesty's Treasury, the fees to be taken therein; which Rules shall be deemed Rules of Court within section seventeen of the Appellate Jurisdiction Act, 1876, as altered by section nineteen of the Supreme Court of Judicature Act, 1881, and may be made, at any time after the passing of this Act, to take effect on or after the commencement of this Act.

39 & 40 Vict. c. 59. 44 & 45 Vict. c. 68.

(6.) If any officer, clerk, or person employed in the office commits or

(*i*) See the Land Charges Registration and Searches Act, 1888 (51 & 52 Vict. c. 51); *ante*, p. 387.

is party or privy to, any act of fraud or collusion, or is wilfully negligent, in the making of or otherwise in relation to any certificate or office copy under this section, he shall be guilty of a misdemeanor. 45 & 46 Vict. c. 39.

(7.) Nothing in this section or in any Rule made thereunder shall take away, abridge, or prejudicially affect any right which any person may have independently of this section to make any search in the office; and every such search may be made as if this section or any such Rule had not been enacted or made.

(8.) Where a solicitor obtains an office copy certificate of result of search under this section, he shall not be answerable in respect of any loss that may arise from error in the certificate.

(9.) Where the solicitor is acting for trustees, executors, agents, or other persons in a fiduciary position, those persons also shall not be so answerable.

(10.) Where such persons obtain such an office copy without a solicitor, they shall also be protected in like manner.

(11.) Nothing in this section applies to deeds inrolled under the Fines and Recoveries Act, or under any other Act, or under any statutory Rule. 3 & 4 Will. IV. c. 74.

(12.) This section does not extend to Ireland.

Notice.

Restriction on constructive notice (*k*).

3.—(1.) A purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing unless—

(i.) It is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or

(ii.) In the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor, or other agent, as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent.

(2.) This section shall not exempt a purchaser from any liability under, or any obligation to perform or observe, any covenant, condition, provision, or restriction contained in any instrument under which his title is derived, mediately or immediately; and such liability or obligation may be enforced in the same manner and to the same extent as if this section had not been enacted.

(3.) A purchaser shall not by reason of anything in this section be affected by notice in any case where he would not have been so affected if this section had not been enacted.

(*k*) See, as to constructive notice, *ante*, p. 295, note (*r*).

45 & 46 Vict. c. 39.

(4.) This section applies to purchases made either before or after the commencement of this Act; save that, where an action is pending at the commencement of this Act, the rights of the parties shall not be affected by this section.

Leases.

Contract for lease not part of title to lease.

4.—(1.) Where a lease is made under a power contained in a settlement, will, Act of Parliament, or other instrument, any preliminary contract for or relating to the lease shall not, for the purpose of the deduction of title to an intended assign, form part of the title, or evidence of the title, to the lease.

(2.) This section applies to leases made either before or after the commencement of this Act.

Separate Trustees.

5. Repealed by the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 51, and replaced. See s. 10 (2) (b), *post*, p. 546.

Powers.

Disclaimer of power by trustees (*l*).

6.—(1.) A person to whom any power, whether coupled with an interest or not, is given, may, by deed, disclaim the power; and, after disclaimer, shall not be capable of exercising or joining in the exercise of the power.

(2.) On such disclaimer, the power may be exercised by the other or others, or the survivors or survivor of the others, of the persons to whom the power is given, unless the contrary is expressed in the instrument creating the power.

(3.) This section applies to powers created by instruments coming into operation either before or after the commencement of this Act.

Married Women.

Acknowledgments of deeds by married women (*m*).

7.—(1.) In section seventy-nine of the Fines and Recoveries Act, and section seventy of the Fines and Recoveries (Ireland) Act, there shall, by virtue of this Act, be substituted for the words "two of the "perpetual commissioners, or two special commissioners," the words "one of the perpetual commissioners, or one special commissioner;" and in section eighty-three of the Fines and Recoveries Act, and section seventy-four of the Fines and Recoveries (Ireland) Act, there shall, by virtue of this Act, be substituted for the word "persons" the word "person," and for the word "commissioners" the words "a commis-

(*l*) The words "by trustees" in this marginal note are inaccurate.

(*m*) See *ante*, pp. 124, 125.

sioner;" and all other provisions of those Acts, and all other enactments having reference in any manner to the sections aforesaid, shall be read and have effect accordingly. 45 & 46 Vict. c. 39.

(2.) Where the memorandum of acknowledgment by a married woman of a deed purports to be signed by a person authorized to take the acknowledgment, the deed shall, as regards the execution thereof by the married woman, take effect at the time of acknowledgment, and shall be conclusively taken to have been duly acknowledged.

(3.) A deed acknowledged before or after the commencement of this Act by a married woman, before a judge of the High Court of Justice in England or Ireland, or before a judge of a County Court in England, or before a chairman in Ireland, or before a perpetual commissioner or a special commissioner, shall not be impeached or impeachable by reason only that such judge, chairman, or commissioner was interested or concerned either as a party, or as solicitor, or clerk to the solicitor for one of the parties, or otherwise, in the transaction giving occasion for the acknowledgment; and general rules shall be made for preventing any person interested or concerned as aforesaid from taking an acknowledgment, but no such rule shall make invalid any acknowledgment; and those rules shall, as regards England, be deemed Rules of Court within section seventeen of the Appellate Jurisdiction Act, 1876, as altered by section nineteen of the Supreme Court of Judicature Act, 1881, and shall, as regards Ireland, be deemed Rules of Court within the Supreme Court of Judicature Act (Ireland), 1877, and may be made accordingly, for England and Ireland respectively, at any time after the passing of this Act, to take effect on or after the commencement of this Act. 39 & 40 Vict. c. 59. 44 & 45 Vict. c. 68. 40 & 41 Vict. c. 57.

(4.) The enactments described in the schedule to this Act are hereby repealed.

(5.) The foregoing provisions of this section, including the repeal therein, apply only to the execution of deeds by married women after the commencement of this Act.

(6.) Notwithstanding the repeal or any other thing in this section, the certificate, if not lodged before the commencement of this Act, of the taking of an acknowledgment by a married woman of a deed executed before the commencement of this Act, with any affidavit relating thereto, shall be lodged, examined, and filed in the like manner and with the like effects and consequences as if this section had not been enacted.

(7.) There shall continue to be kept in the proper office of the Supreme Court of Judicature an index to all certificates of acknowledgments of deeds by married women lodged therein, before or after the commencement of this Act, containing the names of the married women and their husbands, alphabetically arranged, and the dates of the certificates and of the deeds to which they respectively relate, and other particulars found convenient; and every such certificate lodged after the

45 & 46 Vict. c. 39.

commencement of this Act shall be entered in the index as soon as may be after the certificate is filed.

(8.) An office copy of any such certificate filed before or after the commencement of this Act shall be delivered to any person applying for the same; and every such office copy shall be received as evidence of the acknowledgment of the deed to which the certificate refers.

Powers of Attorney (n).

Effect of power of attorney, for value, made absolutely irrevocable.

8.—(1.) If a power of attorney, given for valuable consideration, is in the instrument creating the power expressed to be irrevocable, then, in favour of a purchaser,—

(i.) The power shall not be revoked at any time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power; and

(ii.) Any act done at any time by the donee of the power in pursuance of the power, shall be as valid as if anything done by the donor of the power without the concurrence of the donee of the power, or the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power, had not been done or happened; and

(iii.) Neither the donee of the power nor the purchaser shall at any time be prejudicially affected by notice of anything done by the donor of the power, without the concurrence of the donee of the power, or of the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power.

(2.) This section applies only to powers of attorney created by instruments executed after the commencement of this Act.

Effect of power of attorney, for value or not, made irrevocable for fixed time.

9.—(1.) If a power of attorney, whether given for valuable consideration or not, is in the instrument creating the power expressed to be irrevocable for a fixed time therein specified, not exceeding one year from the date of the instrument, then, in favour of a purchaser,—

(i.) The power shall not be revoked, for and during that fixed time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power; and

(ii.) Any act done within that fixed time, by the donee of the power, in pursuance of the power, shall be as valid as if anything done by the donor of the power without the concurrence of the donee of the power, or the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power, had not been done or happened; and

(iii.) Neither the donee of the power, nor the purchaser, shall at any time be prejudicially affected by notice either during or after that fixed

(n) See *ante*, pp. 316—318.

time of anything done by the donor of the power during that fixed time, without the concurrence of the donee of the power, or of the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power within that fixed time.

(2.) This section applies only to powers of attorney created by instruments executed after the commencement of this Act.

Executory Limitations.

Restriction on executory limitations (*o*).

10.—(1.) Where there is a person entitled to land for an estate in fee or for a term of years absolute or determinable on life, or for a term of life, with an executory limitation over on default or failure of all or any of his issue, whether within or at any specified period or time or not, that executory limitation shall be or become void and incapable of taking effect, if and as soon as there is living any issue who has attained the age of twenty-one years, of the class on default of failure whereof the limitation over was to take effect.

(2.) This section applies only where the executory limitation is contained in an instrument coming into operation after the commencement of this Act.

Long Terms.

Amendment of enactment respecting long terms.

11. Section sixty-five of the Conveyancing Act of 1881 shall apply to and include, and shall be deemed to have always applied to and included, every such term as in that section mentioned, whether having as the immediate reversion thereon the freehold or not; but not

(i.) Any term liable to be determined by re-entry for condition broken; or

(ii.) Any term created by sub-demise out of a superior term, itself incapable of being enlarged into a fee simple.

Mortgages.

Reconveyance on mortgage (*p*).

12. The right of the mortgagor, under section fifteen of the Conveyancing Act, 1881, to require a mortgagee, instead of reconveying, to assign the mortgaged debt and convey the mortgaged property to a third person, shall belong to and be capable of being enforced by each incumbrancer, or by the mortgagor, notwithstanding any intermediate incumbrance; but a requisition of an incumbrancer shall prevail over a requisition of the mortgagor, and, as between incumbrancers, a requisition of a prior incumbrancer shall prevail over a requisition of a subsequent incumbrancer.

(*o*) See *ante*, pp. 289, 411, and the Settled Land Act, 1882, s. 58 (1) (ii.), *post*, p. 522.

(*p*) See *ante*, pp. 210—?12.

45 & 46 Vict. c. 39.

Saving.

Restriction on repeals in this Act.

13. The repeal by this Act of any enactment shall not affect any right accrued or obligation incurred thereunder before the commencement of this Act; nor shall the same affect the validity or invalidity, or any operation, effect, or consequence, of any instrument, executed or made, or of anything done or suffered, before the commencement of this Act; nor shall the same affect any action, proceeding, or thing then pending or uncompleted; and every such action, proceeding, and thing may be carried on and completed as if there had been no such repeal in this Act.

SCHEDULE.

REPEALS.

Section 7 (4).		
	3 & 4 Will. IV. c. 74 . in part.	The Fines and Recoveries Act, in part: namely,— Section eighty-four, from and including the words "and the same Judge," to the end of that section. Sections eighty-five to eighty-eight inclusive.
	4 & 5 Will. IV. c. 92 . in part.	The Fines and Recoveries (Ireland) Act . . . . . in part; namely,— Section seventy-five, from and including the words "and the same Judge," to the end of that section. Sections seventy-six to seventy-nine inclusive.
	17 & 18 Vict. c. 75. .	An Act to remove doubts concerning the due acknowledgments of deeds by married women in certain cases.
	41 & 42 Vict. c. 23. .	The Acknowledgment of Deeds by Married Women (Ireland) Act, 1878.

THE CONVEYANCING AND LAW OF PROPERTY ACT, 1892.

[55 & 56 VICT. CH. 13.]

An Act to amend the Conveyancing and Law of Property Act, 1881.

[20th June, 1892.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Com-

mons, in this present Parliament assembled, and by the authority of the same, as follows : 55 & 56 Vict. c. 13.

Preliminary.

Short title and extent. 44 & 45 Vict c. 41. 45 & 46 Vict. c. 39.

1.—(1.) This Act may be cited as the Conveyancing and Law of Property Act, 1892, and the Conveyancing and Law of Property Act, 1881, and the Conveyancing Act, 1882, and this Act shall be read together and may be cited as the Conveyancing Acts, 1881, 1882, and 1892 (*q*).

(2.) This Act does not extend to Scotland.

Leases, Under-leases, Forfeiture.

Costs of waiver, and forfeiture in case of bankruptcy or execution.

2.—(1.) A lessor shall be entitled to recover as a debt due to him from a lessee, and in addition to damages (if any) all reasonable costs and expenses properly incurred by the lessor in the employment of a solicitor and surveyor or valuer, or otherwise, in reference to any breach giving rise to a right of re-entry or forfeiture which, at the request of the lessee, is waived by the lessor by writing under his hand, or from which the lessee is relieved, under the provisions of the Conveyancing and Law of Property Act, 1881 (*r*), or of this Act.

(2.) Sub-section six of section fourteen of the Conveyancing and Law of Property Act, 1881, is to apply to a condition for forfeiture on bankruptcy of the lessee, or on taking in execution of the lessee's interest only after the expiration of one year from the date of the bankruptcy, or taking in execution, and provided the lessee's interest be not sold within such one year, but in case the lessee's interest be sold within such one year, sub-section six shall cease to be applicable thereto.

(3.) Sub-section two of this section is not to apply to any lease of—

(a.) Agricultural or pastoral land :

(b.) Mines or minerals :

(c.) A house used or intended to be used as a public-house or beer-shop :

(d.) A house let as a dwelling-house, with the use of any furniture, books, works of art, or other chattels not being in the nature of fixtures :

(e.) Any property with respect to which the personal qualifications of the tenant are of importance for the preservation of the value or character of the property, or on the ground of neighbourhood to the lessor, or to any person holding under him.

(*q*) The short title is now the Conveyancing Acts, 1881 to 1892. See the Short Titles Act, 1896 (59 & 60 Vict. c. 14.)

(*r*) See *ante*, pp. 175—177. As to relief against forfeiture for non-payment of rent, see *ante*, pp. 177, 178, 177, note (*o*).

55 & 56 Vict. c. 13.

No fine to be exacted for licence to assign.

3. In all leases containing a covenant, condition, or agreement against assigning, underletting, or parting with the possession or disposing of the land or property leased without licence or consent, such covenant, condition, or agreement shall, unless the lease contains an express provision to the contrary, be deemed to be subject to a proviso to the effect that no fine or sum of money in the nature of a fine (*s*) shall be payable for or in respect of such licence or consent; but this proviso shall not preclude the right to require the payment of a reasonable sum in respect of any legal or other expense incurred in relation to such licence or consent.

Power of Court to protect under-lessees on forfeiture of superior leases (*t*).

4. Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant, proviso, or stipulation in a lease, the Court may, on application by any person claiming as under-lessee any estate or interest in the property comprised in the lease or any part thereof either in the lessor's action (if any) or in any action brought by such person for that purpose, make an order vesting for the whole term of the lease or any less term the property comprised in the lease or any part thereof in any person entitled as under-lessee to any estate or interest in such property upon such conditions, as to execution of any deed or other document, payment of rent, costs, expenses, damages, compensation, giving security, or otherwise, as the Court in the circumstances of each case shall think fit, but in no case shall any such under-lessee be entitled to require a lease to be granted to him for any longer term than he had under his original sub-lease.

Extension of definitions of "lease," "under-lease," and "under-lessee."

5. In section fourteen of the Conveyancing and Law of Property Act, 1881, as amended by this Act, and in this Act "lease" shall also include an agreement for a lease where the lessee has become entitled to have his lease granted, and "under-lease" shall also include an agreement for an under-lease where the under-lessee has become entitled to have his under-lease granted, and in this Act "under-lessee" shall include any person deriving title under or from an under-lessee.

Trustees.

6. Repealed by the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 51, and replaced. See s. 10 (2) of that Act, *post*, p. 546.

(*s*) See *ante*, p. 176, note (*i*).

(*t*) See *ante*, p. 177, note (*n*).

THE SETTLED LAND ACT, 1882.

45 & 46 Vict. c. 38.

[45 & 46 VICT. CH. 38.]

An Act for facilitating Sales, Leases, and other dispositions of Settled Land, and for promoting the execution of Improvements thereon.

[10th August, 1882.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

I.—PRELIMINARY.

Short title; commencement; extent.

1.—(1.) This Act may be cited as the Settled Land Act, 1882.

(2.) This Act, except where it is otherwise expressed, shall commence and take effect from and immediately after the thirty-first day of December, one thousand eight hundred and eighty-two, which time is in this Act referred to as the commencement of this Act.

(3.) This Act does not extend to Scotland.

II.—DEFINITIONS.

Definition of settlement, tenant for life, &c.

2.—(1.) Any deed, will, agreement for a settlement, or other agreement, covenant to surrender, copy of court roll, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, under or by virtue of which instrument or instruments any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates or is for purposes of this Act a settlement (*u*), and is in this Act referred to as a settlement, or as the settlement, as the case requires.

(2.) An estate or interest in remainder or reversion not disposed of by a settlement, and reverting to the settlor or descending to the testator's heir, is for purposes of this Act an estate or interest coming to the settlor or heir under or by virtue of the settlement, and comprised in the subject of the settlement.

(3.) Land, and any estate or interest therein, which is the subject of a settlement, is for purposes of this Act settled land, and is, in relation to the settlement, referred to in this Act as the settled land.

(4.) The determination of the question whether land is settled land, for purposes of this Act, or not, is governed by the state of facts, and

(*u*) See the S. L. A., 1890 (53 & 54 Vict. c. 69), s. 4; and the definition of settlement extended to other cases by s. 58, sub-s. (2), *post*, p. 522.

45 & 46 Vict. c. 38.

the limitations of the settlement, at the time of the settlement taking effect.

(5.) The person who is for the time being, under a settlement, beneficially entitled to possession of settled land, for his life, is for purposes of this Act the tenant for life of that land, and the tenant for life under that settlement.

(6.) If, in any case, there are two or more persons so entitled as tenants in common, or as joint tenants, or for other concurrent estates or interests, they together constitute the tenant for life for purposes of this Act.

(7.) A person being tenant for life within the foregoing definitions shall be deemed to be such notwithstanding that, under the settlement or otherwise, the settled land, or his estate or interest therein, is incumbered or charged in any manner or to any extent.

(8.) The persons, if any, who are for the time being, under a settlement, trustees with power of sale of settled land, or with power of consent to or approval of the exercise of such a power of sale, or if under a settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for purposes of this Act, are for purposes of this Act trustees of the settlement (*x*).

(9.) Capital money arising under this Act, and receivable for the trusts and purposes of the settlement, is in this Act referred to as capital money arising under this Act.

(10.) In this Act—

(i.) Land (*y*) includes incorporeal hereditaments, also an undivided share in land; income includes rents and profits; and possession includes receipt of income:

(ii.) Rent includes yearly or other rent, and toll, duty, royalty, or other reservation, by the acre, or the ton, or otherwise; and, in relation to rent, payment includes delivery; and fine includes premium or fore-gift, and any payment, consideration, or benefit in the nature of a fine, premium, or fore-gift:

(iii.) Building purposes include the erecting and the improving of, and the adding to, and the repairing of buildings; and a building lease is a lease for any building purposes or purposes connected therewith:

(iv.) Mines and minerals mean mines and minerals whether already opened or in work or not, and include all minerals and substances in, on, or under the land, obtainable by underground or by surface working; and mining purposes include the sinking and searching for, winning, working, getting, making merchantable, smelting or otherwise converting or working for the purposes of any manufacture, carrying

(*x*) See also the S. L. A., 1890 (53 & 54 Vict. c. 69), s. 16.

(*y*) See *ante*, p. 10.

away, and disposing of mines and minerals, in or under the settled land, or any other land, and the erection of buildings, and the execution of engineering and other works, suitable for those purposes; and a mining lease is a lease for any mining purposes or purposes connected therewith, and includes a grant or licence for any mining purposes:

(v.) Manor includes lordship, and reputed manor or lordship:

(vi.) Steward includes deputy steward, or other proper officer, of a manor:

(vii.) Will includes codicil, and other testamentary instrument, and a writing in the nature of a will:

(viii.) Securities include stocks, funds, and shares:

(ix.) Her Majesty's High Court of Justice is referred to as the Court:

(x.) The Land Commissioners (*z*) for England as constituted by this Act are referred to as the Land Commissioners:

(xi.) Person includes corporation.

III.—Sale; Enfranchisement; Exchange; Partition.

General Powers and Regulations.

Powers to tenant for life to sell, &c.

3. A tenant for life—

(i.) May sell (*a*) the settled land, or any part thereof, or any easement, right, or privilege of any kind, over or in relation to the same; and

(ii.) Where the settlement comprises a manor,—may sell the seignory (*b*) of any freehold land within the manor, or the freehold and inheritance of any copyhold or customary land, parcel of the manor, with or without any exception or reservation of all or any mines or minerals, or of any rights or powers relative to mining purposes, so as in every such case to effect an enfranchisement (*c*); and

(iii.) May make an exchange (*d*) of the settled land or any part thereof, or other land, including an exchange in consideration of money paid for equality of exchange; and

(iv.) Where the settlement comprises an undivided share in land, or, under the settlement, the settled land has come to be held in undivided shares,—may concur in making partition of the

(*z*) See *ante*, p. 54, note (*y*).

(*a*) See *ante*, pp. 52, *et seq.*, 309. As to sales, exchanges, or leases of land under the Act for the erection thereon of dwellings for the working classes, see the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 74 (1) (a); and as to the meaning of working classes (53 & 54 Vict. c. 69), s. 18. As to sales, exchanges, or leases of settled land to County Councils, see the Small Holdings Act, 1892 (55 & 56 Vict. c. 31), ss. 12, 13.

(*b*) See *ante*, p. 321.

(*c*) See *ante*, p. 334.

(*d*) See *ante*, p. 52, *et seq.*; and 53 & 54 Vict. c. 69, s. 5.

45 & 46 Vict. c. 38.

entirety, including a partition in consideration of money paid for equality of partition (*e*).

Regulations respecting sale, enfranchisement, exchange, and partition.

4.—(1.) Every sale shall be made at the best price (*f*) that can reasonably be obtained.

(2.) Every exchange and every partition shall be made for the best consideration in land or in land and money that can reasonably be obtained.

(3.) A sale may be made in one lot or in several lots, and either by auction or by private contract.

(4.) On a sale the tenant for life may fix reserve biddings, and buy in at an auction.

(5.) A sale, exchange, or partition may be made subject to any stipulations respecting title, or evidence of title, or other things.

(6.) On a sale, exchange, or partition, any restriction or reservation with respect to building on or other user of land, or with respect to mines and minerals, or with respect to or for the purpose of the more beneficial working thereof, or with respect to any other thing, may be imposed or reserved and made binding, as far as the law permits, by covenant, condition, or otherwise, on the tenant for life and the settled land, or any part thereof, or on the other party and any land sold or given in exchange or on partition to him.

(7.) An enfranchisement may be made with or without a re-grant of any right of common or other right, easement, or privilege theretofore appendant or appurtenant to or held or enjoyed with the land enfranchised, or reputed so to be.

(8.) Settled land in England shall not be given in exchange for land out of England.

Special Powers.

Transfer of incumbrances on land sold, &c.

5. Where, on a sale, exchange, or partition there is an incumbrance (*g*) affecting land sold or given in exchange or on partition, the tenant for life, with the consent of the incumbrancer, may charge that incumbrance on any other part of the settled land, whether already charged therewith or not, in exoneration of the part sold or so given, and, by conveyance of the fee simple, or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or otherwise, make provision accordingly.

IV.—Leases (*h*).

General Powers and Regulations.

Power for tenant for life

6. A tenant for life may lease the settled land, or any part thereof, or

(*e*) See *ante*, p. 260.

(*f*) See *ante*, p. 52, note (*d*).

(*g*) Includes a rentcharge under the Improvement of Land Act, 1864; *Re Earl of Strafford*, [1896] 1 Ch. 235.

(*h*) See *ante*, pp. 55, 56, and p. 499, note (*a*).

any easement, right, or privilege of any kind, over or in relation to the same, for any purpose whatever, whether involving waste or not, for any term not exceeding—

to lease for ordinary or building or mining purposes.

(i.) In case of a building lease, ninety-nine years :

(ii.) In case of a mining lease, sixty years :

(iii.) In case of any other lease, twenty-one years.

Regulations respecting leases generally (i).

7.—(1.) Every lease shall be by deed, and be made to take effect in possession (*k*) not later than twelve months after its date.

(2.) Every lease shall reserve the best rent that can reasonably be obtained, regard being had to any fine taken, and to any money laid out or to be laid out for the benefit of the settled land, and generally to the circumstances of the case.

(3.) Every lease shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days.

(4.) A counterpart of every lease shall be executed by the lessee and delivered to the tenant for life ; of which execution and delivery the execution of the lease by the tenant for life shall be sufficient evidence.

(5.) A statement, contained in a lease or in an indorsement thereon, signed by the tenant for life, respecting any matter of fact or of calculation under this Act in relation to the lease, shall, in favour of the lessee and of those claiming under him, be sufficient evidence of the matter stated.

Building and Mining Leases.

Regulations respecting building leases (*l*).

8.—(1.) Every building lease shall be made partly in consideration of the lessee, or some person by whose direction the lease is granted, or some other person, having erected, or agreeing to erect, buildings, new or additional, or having improved or repaired, or agreeing to improve or repair, buildings, or having executed, or agreeing to execute, on the land leased, an improvement authorized by this Act, for or in connexion with building purposes.

(2.) A peppercorn rent or a nominal or other rent less than the rent ultimately payable, may be made payable for the first five years or any less part of the term.

(3.) Where the land is contracted to be leased in lots, the entire amount of rent to be ultimately payable may be apportioned among the lots in any manner ; save that—

(*i*) Modified as to leases for a term not exceeding twenty-one years by the S. L. A., 1890 (53 & 54 Vict. c. 69), s. 7.

(*k*) A lease of the reversion is not a lease taking effect in possession, Sugd. Pow., p. 763.

(*l*) Amended by the S. L. A., 1889 (52 & 53 Vict. c. 36), s. 2.

45 & 46 Vict. c. 38.

(i.) The annual rent reserved by any lease shall not be less than ten shillings; and

(ii.) The total amount of the rents reserved on all leases for the time being granted shall not be less than the total amount of the rents which, in order that the leases may be in conformity with this Act, ought to be reserved in respect of the whole land for the time being leased; and

(iii.) The rent reserved by any lease shall not exceed one fifth part of the full annual value of the land comprised in that lease with the buildings thereon when completed.

Regulations respecting mining leases (*m*).

9.—(1.) In a mining lease—

(i.) The rent may be made to be ascertainable by or to vary according to the acreage worked, or by or according to the quantities of any mineral or substance gotten, made merchantable, converted, carried away, or disposed of, in or from the settled land, or any other land, or by or according to any facilities given in that behalf; and

(ii.) A fixed or minimum rent may be made payable, with or without power for the lessee, in case the rent, according to acreage, or quantity, in any specified period does not produce an amount equal to the fixed or minimum rent, to make up the deficiency in any subsequent specified period, free of rent other than the fixed or minimum rent.

(2.) A lease may be made partly in consideration of the lessee having executed, or his agreeing to execute, on the land leased, an improvement authorized by this Act, for or in connexion with mining purposes.

Variation of building or mining lease according to circumstances of district (*n*).

10.—(1.) Where it is shewn to the Court with respect to the district in which any settled land is situate, either—

(i.) That it is the custom for land therein to be leased or granted for building or mining purposes for a longer term or on other conditions than the term or conditions specified in that behalf in this Act, or in perpetuity; or

(ii.) That it is difficult to make leases or grants for building or mining purposes of land therein, except for a longer term or on other conditions than the term and conditions specified in that behalf in this Act, or except in perpetuity;

the Court may, if it thinks fit, authorize generally the tenant for life to make from time to time leases or grants of or affecting the settled land in that district, or parts thereof, for any term or in perpetuity, at fee-farm or other rents, secured by condition of re-entry, or otherwise, as in the order of the Court expressed, or may, if it thinks fit, authorize the tenant for life to make any such lease or grant in any particular case.

(*m*) See *ante*, pp. 55, 56, and the S. L. A., 1890 (53 & 54 Vict. c. 69), s. 8.

(*n*) See also the S. L. A., 1890 (53 & 54 Vict. c. 69), s. 9.

(2.) Thereupon the tenant for life, and, subject to any direction in the order of the Court to the contrary, each of his successors in title being a tenant for life, or having the powers of a tenant for life under this Act, may make in any case, or in the particular case, a lease or grant of or affecting the settled land, or part thereof, in conformity with the order. 45 & 46 Vict. c. 38.

Part of mining rent to be set aside.

11. Under a mining lease, whether the mines or minerals leased are already opened or in work or not, unless a contrary intention is expressed in the settlement, there shall be from time to time set aside, as capital money arising under this Act, part of the rent as follows, namely,—where the tenant for life is impeachable for waste in respect of minerals, three fourth parts of the rent, and otherwise one fourth part thereof, and in every such case the residue of the rent shall go as rents and profits.

Special Powers.

Leasing powers for special objects.

12. The leasing power of a tenant for life extends to the making of—

(i.) A lease for giving effect to a contract entered into by any of his predecessors in title for making a lease, which, if made by the predecessor, would have been binding on the successors in title; and

(ii.) A lease for giving effect to a covenant of renewal, performance whereof could be enforced against the owner for the time being of the settled land; and

(iii.) A lease for confirming, as far as may be, a previous lease, being void or voidable; but so that every lease, as and when confirmed, shall be such a lease as might at the date of the original lease have been lawfully granted, under this Act, or otherwise, as the case may require.

Surrenders (o).

Surrender and new grant of leases.

13.—(1.) A tenant for life may accept, with or without consideration, a surrender of any lease of settled land, whether made under this Act or not, in respect of the whole land leased, or any part thereof, with or without an exception of all or any of the mines and minerals therein, or in respect of mines and minerals, or any of them.

(2.) On a surrender of a lease in respect of part only of the land or mines and minerals leased, the rent may be apportioned.

(3.) On a surrender, the tenant for life may make of the land or mines and minerals surrendered, or of any part thereof, a new or other lease, or new or other leases in lots.

(o) See *ante*, p. 56, note (r).

45 & 46 Vict. c. 38.

(4.) A new or other lease may comprise additional land or mines and minerals, and may reserve any apportioned or other rent.

(5.) On a surrender, and the making of a new or other lease, whether for the same or for any extended or other term, and whether or not subject to the same or to any other covenants, provisions, or conditions, the value of the lessee's interest in the lease surrendered may be taken into account in the determination of the amount of the rent to be reserved, and of any fine to be taken, and of the nature of the covenants, provisions, and conditions to be inserted in the new or other lease.

(6.) Every new or other lease shall be in conformity with this Act.

Copyholds.

Power to grant to copyholders licences for leasing.

14.—(1.) A tenant for life may grant to a tenant of copyhold or customary land, parcel of a manor comprised in the settlement, a licence to make any such lease of that land, or of a specified part thereof, as the tenant for life is by this Act empowered to make of freehold land.

(2.) The licence may fix the annual value whereon fines, fees, or other customary payments are to be assessed, or the amount of those fines, fees, or payments.

(3.) The licence shall be entered on the court rolls of the manor, of which entry a certificate in writing of the steward shall be sufficient evidence.

V.—Sales, Leases, and other Dispositions.

Mansion and Park.

15. Repealed and replaced by the S. L. A., 1890 (53 & 54 Vict. c. 69), s. 10. See *post*, p. 533.

Streets and Open Spaces.

Dedication for streets, open spaces, &c.

16. On or in connexion with a sale or grant for building purposes, or a building lease, the tenant for life, for the general benefit of the residents on the settled land, or on any part thereof,—

(i.) May cause or require any parts of the settled land to be appropriated and laid out for streets, roads, paths, squares, gardens, or other open spaces, for the use, gratuitously or on payment, of the public or of individuals, with sewers, drains, watercourses, fencing, paving, or other works necessary or proper in connexion therewith ; and

(ii.) May provide that the parts so appropriated shall be conveyed to

or vested in the trustees of the settlement, or other trustees, or any company or public body, on trust or subject to provisions for securing the continued appropriation thereof to the purposes aforesaid, and the continued repair or maintenance of streets and other places and works aforesaid, with or without provision for appointment of new trustees when required; and

(iii.) May execute any general or other deed necessary or proper for giving effect to the provisions of this section (which deed may be inrolled in the Central Office of the Supreme Court of Judicature), and thereby declare the mode, terms, and conditions of the appropriation, and the manner in which and the persons by whom the benefit thereof is to be enjoyed, and the nature and extent of the privileges and conveniences granted.

Surface and Minerals Apart.

Separate dealing with surface and minerals, with or without wayleaves, &c. (*p*)

17.—(1.) A sale, exchange, partition, or mining lease, may be made either of land, with or without an exception or reservation of all or any of the mines and minerals therein, or of any mines and minerals, and in any such case with or without a grant or reservation of powers of working, wayleaves or rights of way, rights of water and drainage, and other powers, easements, rights, and privileges for or incident to or connected with mining purposes, in relation to the settled land, or any part thereof, or any other land.

(2.) An exchange or partition may be made subject to and in consideration of the reservation of an undivided share in mines or minerals.

Mortgage.

Mortgage for equality money, &c. (*q*)

18. Where money is required for enfranchisement, or for equality of exchange or partition, the tenant for life may raise the same on mortgage of the settled land, or of any part thereof, by conveyance of the fee simple, or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or otherwise, and the money raised shall be capital money arising under this Act.

Undivided Share.

Concurrence in exercise of powers as to undivided share.

19. Where the settled land comprises an undivided share in land, or, under the settlement, the settled land has come to be held in undivided shares, the tenant for life of an undivided share may join or concur, in

(*p*) See S. L. A., 1890 (53 & 54 Vict. c. 69), s. 5.

(*q*) See S. L. A., 1890 (53 & 54 Vict. c. 69), s. 11.

45 & 46 Vict. c. 38.

any manner, and to any extent necessary or proper for any purpose of this Act, with any person entitled to or having power or right of disposition of or over another undivided share.

Conveyance.

Completion of sale, lease, &c., by conveyance (*r*).

20.—(1.) On a sale, exchange, partition, lease, mortgage, or charge, the tenant for life may, as regards land sold, given in exchange or on partition, leased, mortgaged, or charged, or intended so to be, including copyhold or customary or leasehold land vested in trustees, or as regards easements or other rights or privileges sold or leased, or intended so to be, convey or create the same by deed, for the estate or interest the subject of the settlement, or for any less estate or interest, to the uses and in the manner requisite for giving effect to the sale, exchange, partition, lease, mortgage, or charge.

(2.) Such a deed, to the extent and in the manner to and in which it is expressed or intended to operate and can operate under this Act, is effectual to pass the land conveyed, or the easements, rights, or privileges created, discharged from all the limitations, powers, and provisions of the settlement, and from all estates, interests, and charges subsisting or to arise thereunder, but subject to and with the exception of—

(i.) All estates, interests, and charges having priority to the settlement; and

(ii.) All such other, if any, estates, interests, and charges as have been conveyed or created for securing money actually raised at the date of the deed; and

(iii.) All leases and grants at fee-farm rents or otherwise, and all grants of easements, rights of common, or other rights or privileges granted or made for value in money or money's worth, or agreed so to be, before the date of the deed, by the tenant for life, or by any of his predecessors in title, or by any trustees for him or them, under the settlement, or under any statutory power, or being otherwise binding on the successors in title of the tenant for life.

(3.) In case of a deed relating to copyhold or customary land, it is sufficient that the deed be entered on the court rolls of the manor, and the steward is hereby required on production to him of the deed to make the proper entry; and on that production, and on payment of customary fines, fees, and other dues or payments, any person whose title under the deed requires to be perfected by admittance shall be admitted accordingly; but if the steward so requires, there shall also

(*r*) See, as to conveyances to complete a contract entered into by the tenant for life's predecessor in title, S. L. A., 1890 (53 & 54 Vict. c. 69), s. 6.

be produced to him so much of the settlement as may be necessary to show the title of the person executing the deed; and the same may, if the steward thinks fit, be also entered on the court rolls. 45 & 46 Vict. c. 38.

VI.—Investment or other Application of Capital Trust Money.

Capital money under Act; investment, &c., by trustees or Court.

21.—Capital money arising under this Act, subject to payment of claims properly payable thereout, and to application thereof for any special authorized object for which the same was raised, shall, when received, be invested or otherwise applied wholly in one, or partly in one and partly in another or others, of the following modes (namely) (*s*):

(i.) In investment on Government securities, or on other securities on which the trustees of the settlement are by the settlement or by law (*t*) authorized to invest trust money of the settlement, or on the security of the bonds, mortgages, or debentures, or in the purchase of the debenture stock, of any railway company in Great Britain or Ireland incorporated by special Act of Parliament, and having for ten years next before the date of investment paid a dividend on its ordinary stock or shares, with power to vary the investment into or for any other such securities:

(ii.) In discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled land, or other the whole estate the subject of the settlement, or of land-tax, rentcharge in lieu of tithe, Crown rent, chief rent, or quit rent, charged on or payable out of the settled land:

(iii.) In payment for any improvement authorized by this Act (*u*):

(iv.) In payment for equality of exchange or partition of settled land:

(v.) In purchase of the seignory of any part of the settled land, being freehold land, or in purchase of the fee simple of any part of the settled land, being copyhold or customary land:

(vi.) In purchase of the reversion or freehold in fee of any part of the settled land, being leasehold land held for years, or life, or years determinable on life:

(vii.) In purchase of land in fee simple, or of copyhold or customary land, or of leasehold land held for sixty years or more unexpired at the time of purchase, subject or not to any exception or reservation of or in respect of mines or minerals therein, or of or in respect of rights or powers relative to the working of mines or minerals therein, or in other land:

(*s*) This section was amended by the Settled Land Acts (Amendment) Act, 1887 (50 & 51 Vict. c. 30).

(*t*) See the Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 1, *et seq.*

(*u*) See *post*, s. 25, and *ante*, p. 54.

45 & 46 Vict. c. 38.

(viii.) In purchase, either in fee simple, or for a term of sixty years or more, of mines and minerals convenient to be held or worked with the settled land, or of any easement, right, or privilege convenient to be held with the settled land for mining or other purposes:

(ix.) In payment to any person becoming absolutely entitled or empowered to give an absolute discharge:

(x.) In payment of costs, charges, and expenses of or incidental to the exercise of any of the powers, or the execution of any of the provisions, of this Act:

(xi.) In any other mode in which money produced by the exercise of a power of sale in the settlement is applicable thereunder.

Regulations respecting investment, devolution, and income of securities, &c.

22.—(1.) Capital money arising under this Act shall, in order to its being invested or applied as aforesaid, be paid either to the trustees of the settlement or into Court, at the option of the tenant for life, and shall be invested or applied by the trustees, or under the direction of the Court, as the case may be, accordingly.

(2.) The investment or other application by the trustees shall be made according to the direction of the tenant for life, and in default thereof, according to the discretion of the trustees, but in the last-mentioned case subject to any consent required or direction given by the settlement with respect to the investment or other application by the trustees of trust money of the settlement; and any investment shall be in the names or under the control of the trustees.

(3.) The investment or other application under the direction of the Court shall be made on the application of the tenant for life, or of the trustees.

(4.) Any investment or other application shall not during the life of the tenant for life be altered without his consent.

(5.) Capital money arising under this Act while remaining uninvested or unapplied, and securities on which an investment of any such capital money is made, shall, for all purposes of disposition, transmission, and devolution, be considered as land, and the same shall be held for and go to the same persons successively, in the same manner and for and on the same estates, interests, and trusts, as the land wherefrom the money arises would, if not disposed of, have been held and have gone under the settlement (*x*).

(6.) The income of those securities shall be paid or applied as the income of that land, if not disposed of, would have been payable or applicable under the settlement.

(7.) Those securities may be converted into money, which shall be capital money arising under this Act.

(*x*) See *Re Duke of Marlborough and Governors of Queen Anne's Bounty*, [1897] 1 Ch. 713.

23. Capital money arising under this Act from settled land in England shall not be applied in the purchase of land out of England, unless the settlement expressly authorizes the same.

Investment in land in England.

24.—(1.) Land acquired by purchase or in exchange, or on partition, shall be made subject to the settlement in manner directed in this section.

Settlement of land purchased, taken in exchange, &c.

(2.) Freehold land shall be conveyed to the uses, on the trusts, and subject to the powers and provisions which, under the settlement, or by reason of the exercise of any power of charging therein contained, are subsisting with respect to the settled land, or as near thereto as circumstances permit, but not so as to increase or multiply charges or powers of charging.

(3.) Copyhold, customary, or leasehold land shall be conveyed to and vested in the trustees of the settlement on trusts and subject to powers and provisions corresponding, as nearly as the law and circumstances permit, with the uses, trusts, powers, and provisions to on and subject to which freehold land is to be conveyed as aforesaid; so nevertheless that the beneficial interest in land held by lease for years shall not vest absolutely in a person who is by the settlement made by purchase tenant in tail, or in tail male, or in tail female, and who dies under the age of twenty-one years, but shall, on the death of that person under that age, go as freehold land conveyed as aforesaid would go.

(4.) Land acquired as aforesaid may be made a substituted security for any charge in respect of money actually raised, and remaining unpaid, from which the settled land, or any part thereof, or any undivided share therein, has theretofore been released on the occasion and in order to the completion of a sale, exchange, or partition.

(5.) Where a charge does not affect the whole of the settled land, then the land acquired shall not be subjected thereto, unless the land is acquired either by purchase with money arising from sale of land which was before the sale subject to the charge, or by an exchange or partition of land which, or an undivided share wherein, was before the exchange or partition subject to the charge (*y*).

(6.) On land being so acquired, any person who, by the direction of the tenant for life, so conveys the land as to subject it to any charge, is not concerned to inquire whether or not it is proper that the land should be subjected to the charge.

(7.) The provisions of this section referring to land extend and apply, as far as may be, to mines and minerals, and to easements, rights and privileges over and in relation to land.

(*y*) See *Re Duke of Marlborough and Governors of Queen Anne's Bounty*, [1897] 1 Ch. 713.

45 & 46 Vict. c. 38.

VII.—Improvements.

Improvements with Capital Trust Money.

Description of improvements authorized by Act (*z*).

25. Improvements authorized by this Act are the making or execution on, or in connexion with, and for the benefit of settled land, of any of the following works, or of any works for any of the following purposes, and any operation incident to or necessary or proper in the execution of any of those works, or necessary or proper for carrying into effect any of those purposes, or for securing the full benefit of any of those works or purposes (namely):

(i.) Drainage, including the straightening, widening, or deepening of drains, streams, and watercourses:

(ii.) Irrigation; warping:

(iii.) Drains, pipes, and machinery for supply and distribution of sewage as manure:

(iv.) Embanking or weiring from a river or lake, or from the sea, or a tidal water:

(v.) Groynes; sea walls; defences against water:

(vi.) Inclosing; straightening of fences; re-division of fields:

(vii.) Reclamation; dry warping:

(viii.) Farm roads; private roads; roads or streets in villages or towns:

(ix.) Clearing; trenching; planting:

(x.) Cottages for labourers, farm servants, and artizans, employed on the settled land or not:

(xi.) Farm-houses, offices, and out-buildings, and other buildings for farm purposes:

(xii.) Saw-mills, scutch-mills, and other mills, water-wheels, engine-houses, and kilns, which will increase the value of the settled land for agricultural purposes or as woodland or otherwise:

(xiii.) Reservoirs, tanks, conduits, watercourses, pipes, wells, ponds, shafts, dams, weirs, sluices, and other works and machinery for supply and distribution of water for agricultural, manufacturing, or other purposes, or for domestic or other consumption:

(xiv.) Tramways; railways; canals; docks:

(xv.) Jetties, piers, and landing places on rivers, lakes, the sea, or tidal waters, for facilitating transport of persons and of agricultural stock and produce, and of manure and other things required for agricultural purposes, and of minerals, and of things required for mining purposes:

(xvi.) Markets and market-places:

(*z*) See also S. L. A., 1890 (53 & 54 Vict. c. 69), s. 13, and *ante*, pp. 48, 49, and 54.

(xvii.) Streets, roads, paths, squares, gardens, or other open spaces for the use, gratuitously or on payment, of the public or of individuals, or for dedication to the public, the same being necessary or proper in connexion with the conversion of land into building land:

(xviii.) Sewers, drains, watercourses, pipe-making, fencing, paving, brick-making, tile-making, and other works necessary or proper in connexion with any of the objects aforesaid:

(xix.) Trial pits for mines, and other preliminary works necessary or proper in connexion with development of mines:

(xx.) Reconstruction, enlargement, or improvement of any of those works.

Approval by Land Commissioners of scheme for improvement and payment thereon (*a*).

26.—(1.) Where the tenant for life is desirous that capital money arising under this Act shall be applied in or towards payment for an improvement authorized by this Act, he may submit for approval to the trustees of the settlement, or to the Court, as the case may require, a scheme for the execution of the improvement, showing the proposed expenditure thereon.

(2.) Where the capital money to be expended is in the hands of trustees, then, after a scheme is approved by them, the trustees may apply that money in or towards payment for the whole or part of any work or operation comprised in the improvement, on—

(i.) A certificate of the Land Commissioners (*b*) certifying that the work or operation, or some specified part thereof, has been properly executed, and what amount is properly payable by the trustees in respect thereof, which certificate shall be conclusive in favour of the trustees as an authority and discharge for any payment made by them in pursuance thereof; or on

(ii.) A like certificate of a competent engineer or able practical surveyor nominated by the trustees and approved by the Commissioners, or by the Court, which certificate shall be conclusive as aforesaid; or on

(iii.) An order of the Court directing or authorizing the trustees to so apply a specified portion of the capital money.

(3.) Where the capital money to be expended is in Court, then, after a scheme is approved by the Court, the Court may, if it thinks fit, on a report or certificate of the Commissioners, or of a competent engineer or able practical surveyor, approved by the Court, or on such other evidence as the Court thinks sufficient, make such order and give such directions as it thinks fit for the application of that money, or any part thereof, in or towards payments for the whole or part of any work or operation comprised in the improvement.

(*a*) See *ante*, pp. 54, 55.

(*b*) Now the Board of Agriculture. See the Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30), s. 2.

45 & 46 Vict. c. 38.

Concurrence in improvements.

27. The tenant for life may join or concur with any other person interested in executing any improvement authorized by this Act, or in contributing to the cost thereof.

Obligation on tenant for life and successors to maintain, insure, &c. (*c*)

28.—(1.) The tenant for life, and each of his successors in title having, under the settlement, a limited estate or interest only in the settled land, shall, during such period, if any, as the Land Commissioners (*d*) by certificate in any case prescribe, maintain and repair, at his own expense, every improvement executed under the foregoing provisions of this Act, and where a building or work in its nature insurable against damage by fire is comprised in the improvement, shall insure and keep insured the same, at his own expense, in such amount, if any, as the Commissioners by certificate in any case prescribe.

(2.) The tenant for life, or any of his successors as aforesaid, shall not cut down or knowingly permit to be cut down, except in proper thinning, any trees planted as an improvement under the foregoing provisions of this Act.

(3.) The tenant for life, and each of his successors as aforesaid, shall from time to time, if required by the Commissioners, on or without the suggestion of any person having, under the settlement, any estate or interest in the settled land in possession, remainder, or otherwise, report to the Commissioners the state of every improvement executed under this Act, and the fact and particulars of fire insurance, if any.

(4.) The Commissioners may vary any certificate made by them under this section, in such a manner or to such extent as circumstances appear to them to require, but not so as to increase the liabilities of the tenant for life, or any of his successors as aforesaid.

(5.) If the tenant for life, or any of his successors as aforesaid, fails in any respect to comply with the requisitions of this section, or does any act in contravention thereof, any person having, under the settlement, any estate or interest in the settled land in possession, remainder, or reversion, shall have a right of action, in respect of that default or act, against the tenant for life; and the estate of the tenant for life, after his death, shall be liable to make good to the persons entitled under the settlement any damages occasioned by that default or act.

Execution and Repair of Improvements.

Protection as regards waste in execution

29. The tenant for life, and each of his successors in title having, under the settlement, a limited estate or interest only in the settled

(*c*) This section applies to improvements under the Settled Land Acts (Amendment) Act, 1887 (50 & 51 Vict. c. 30). See s. 2 of that Act.

(*d*) Now the Board of Agriculture. See the Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30), s. 2.

land, and all persons employed by or under contract with the tenant for life, or any such successor, may from time to time enter on the settled land, and, without impeachment of waste by any remainderman or reversioner, thereon execute any improvement authorized by this Act, or inspect, maintain, and repair the same, and, for the purposes thereof, on the settled land, do, make, and use all acts, works, and conveniences proper for the execution, maintenance, repair, and use thereof, and get and work freestone, limestone, clay, sand, and other substances, and make tramways and other ways, and burn and make bricks, tiles, and other things, and cut down and use timber and other trees not planted or left standing for shelter or ornament.

45 & 46 Vict. c. 38.

and repair of improvements (*e*).

Improvement of Land Act, 1864.

30. The enumeration of improvements contained in section nine of the Improvement of Land Act, 1864, is hereby extended so as to comprise, subject and according to the provisions of that Act, but only as regards applications made to the Land Commissioners (*f*) after the commencement of this Act, all improvements authorized by this Act.

Extension of 27 & 28 Vict. c. 114, s. 9.

VIII.—CONTRACTS.

31.—(1.) A tenant for life—

Power for tenant for life to enter into contracts.

(i.) May contract to make any sale, exchange, partition, mortgage, or charge; and

(ii.) May vary or rescind, with or without consideration, the contract, in the like cases and manner in which, if he were absolute owner of the settled land, he might lawfully vary or rescind the same, but so that the contract as varied be in conformity with this Act; and any such consideration, if paid in money, shall be capital money arising under this Act; and

(iii.) May contract to make any lease; and in making the lease may vary the terms, with or without consideration, but so that the lease be in conformity with this Act; and

(iv.) May accept a surrender of a contract for a lease, in like manner and on the like terms in and on which he might accept a surrender of a lease; and thereupon may make a new or other contract, or new or other contracts, for or relative to a lease or leases, in like manner and on the like terms in and on which he might make a new or other lease, or new or other leases, where a lease had been granted; and

(v.) May enter into a contract for or relating to the execution of any improvement authorized by this Act, and may vary or rescind the same; and

(*e*) See s. 28, *supra*.

(*f*) See *ante*, p. 512, note (*d*).

45 & 46 Vict. c. 38.

(vi.) May, in any other case, enter into a contract to do any act for carrying into effect any of the purposes of this Act, and may vary or rescind the same.

(2.) Every contract shall be binding on and shall enure for the benefit of the settled land, and shall be enforceable against and by every successor in title for the time being of the tenant for life, and may be carried into effect by any such successor; but so that it may be varied or rescinded by any such successor, in the like case and manner, if any, as if it had been made by himself.

(3.) The Court may, on the application of the tenant for life, or of any such successor, or of any person interested in any contract, give directions respecting the enforcing, carrying into effect, varying, or rescinding thereof.

(4.) Any preliminary contract under this Act for or relating to a lease shall not form part of the title or evidence of the title of any person to the lease, or to the benefit thereof.

IX.—Miscellaneous Provisions.

Application of money in Court under Lands Clauses and other Acts. 8 & 9 Vict. c. 18. 23 & 24 Vict. c. 106. 32 & 33 Vict. c. 18. 40 & 41 Vict. c. 18.

32. Where, under an Act incorporating or applying, wholly or in part, the Lands Clauses Consolidation Acts, 1845, 1860, and 1869, or under the Settled Estates Act, 1877, or under any other Act, public, local, personal, or private, money is at the commencement of this Act in Court, or is afterwards paid into Court, and is liable to be laid out in the purchase of land to be made subject to a settlement, then, in addition to any mode of dealing therewith authorized by the Act under which the money is in Court, that money may be invested or applied as capital money arising under this Act, on the like terms, if any, respecting costs and other things, as nearly as circumstances admit, and (notwithstanding anything in this Act) according to the same procedure, as if the modes of investment or application authorized by this Act were authorized by the Act under which the money is in Court.

Application of money in hands of trustees under powers of settlement.

33. Where under a settlement, money is in the hands of trustees, and is liable to be laid out in the purchase of land to be made subject to the settlement, then, in addition to such powers of dealing therewith as the trustees have independently of this Act, they may, at the option of the tenant for life, invest or apply the same as capital money arising under this Act.

Application of money paid for lease or reversion.

34. Where capital money arising under this Act is purchase money paid in respect of a lease for years, or life, or years determinable on life, or in respect of any other estate or interest in land less than the fee simple, or in respect of a reversion dependent on any such lease, estate or interest, the trustees of the settlement or the Court, as the case may be, and in the case of the Court on the application of any party interested in that money, may, notwithstanding anything in this Act,

require and cause the same to be laid out, invested, accumulated, and paid in such manner as, in the judgment of the trustees or of the Court, as the case may be, will give to the parties interested in that money the like benefit therefrom as they might lawfully have had from the lease, estate, interest, or reversion in respect whereof the money was paid, or as near thereto as may be.

Cutting and sale of timber, and part of proceeds to be set aside (*g*).

35.—(1.) Where a tenant for life is impeachable for waste in respect of timber, and there is on the settled land timber ripe and fit for cutting, the tenant for life, on obtaining the consent of the trustees of the settlement or an order of the Court, may cut and sell that timber, or any part thereof.

(2.) Three fourth parts of the net proceeds of the sale shall be set aside as and be capital money arising under this Act, and the other fourth part shall go as rents and profits.

Proceedings for protection or recovery of land settled or claimed as settled.

36. The Court may, if it thinks fit, approve of any action, defence, petition to Parliament, parliamentary opposition, or other proceeding taken or proposed to be taken for protection of settled land, or of any action or proceeding taken or proposed to be taken for recovery of land being or alleged to be subject to a settlement, and may direct that any costs, charges, or expenses incurred or to be incurred in relation thereto, or any part thereof, be paid out of property subject to the settlement.

Heirlooms (*h*).

37.—(1.) Where personal chattels are settled on trust so as to devolve with land until a tenant in tail by purchase is born or attains the age of twenty-one years, or so as otherwise to vest in some person becoming entitled to an estate of freehold of inheritance in the land a tenant for life of the land may sell the chattels or any of them.

(2.) The money arising by the sale shall be capital money arising under this Act, and shall be paid, invested, or applied and otherwise dealt with in like manner in all respects as by this Act directed with respect to other capital money arising under this Act, or may be invested in the purchase of other chattels, of the same or any other nature, which, when purchased, shall be settled and held on the same trusts, and shall devolve in the same manner as the chattels sold.

(3.) A sale or purchase of chattels under this section shall not be made without an order of the Court.

X.—Trustees.

Appointment of trustees by Court.

38.—(1.) If at any time there are no trustees of a settlement within the definition in this Act (*i*), or where in any other case it is expedient, for purposes of this Act, that new trustees of a settlement be appointed, the

(*g*) See *ante*, pp. 42, *et seq.*

(*h*) See *ante*, pp. 12, note (*m*), 58, note (*g*), and 97, and *Re Duke of Marlborough*, [1897] 1 Ch. 712.

(*i*) See s. 2 (8), *ante*, p. 498, and the S. L. A., 1890 (53 & 54 Vict. c. 69), s. 16.

45 & 46 Vict. c. 38.

Court may, if it thinks fit, on the application of the tenant for life or of any other person having, under the settlement, an estate or interest in the settled land, in possession, remainder, or otherwise, or, in the case of an infant, of his testamentary or other guardian, or next friend, appoint fit persons to be trustees under the settlement for purposes of this Act.

(2.) The persons so appointed, and the survivors and survivor of them, while continuing to be trustees or trustee, and, until the appointment of new trustees, the personal representatives or representative for the time being of the last surviving or continuing trustee, shall for purposes of this Act become and be the trustees or trustee of the settlement.

Number of trustees to act.

39.—(1.) Notwithstanding anything in this Act, capital money arising under this Act shall not be paid to fewer than two persons as trustees of a settlement, unless the settlement authorizes the receipt of capital trust money of the settlement by one trustee.

(2.) Subject thereto, the provisions of this Act referring to the trustees of a settlement apply to the surviving or continuing trustees or trustee of the settlement for the time being.

Trustees' receipts.

40. The receipt in writing of the trustees of a settlement, or where one trustee is empowered to act, of one trustee, or of the personal representatives or representative of the last surviving or continuing trustee for any money or securities, paid or transferred to the trustees, trustee, representatives, or representative, as the case may be, effectually discharges the payer or transferor therefrom, and from being bound to see to the application or being answerable for any loss or misapplication thereof, and, in case of a mortgagee or other person advancing money from being concerned to see that any money advanced by him is wanted for any purpose of this Act, or that no more than is wanted is raised.

Protection of each trustee individually.

41. Each person who is for the time being trustee of a settlement is answerable for what he actually receives only, notwithstanding his signing any receipt for conformity, and in respect of his own acts, receipts, and defaults only, and is not answerable in respect of those of any other trustee, or of any banker, broker, or other person, or for the insufficiency or deficiency of any securities, or for any loss not happening through his own wilful default.

Protection of trustees generally.

42. The trustees of a settlement, or any of them, are not liable for giving any consent, or for not making, bringing, taking, or doing any such application, action, proceeding, or thing, as they might make, bring, take, or do; and in case of purchase of land with capital money arising under this Act, or of an exchange, partition, or lease, are not liable for adopting any contract made by the tenant for life, or bound to inquire as to the propriety of the purchase, exchange, partition, or lease, or answerable as regards any price, consideration, or fine, and are not liable to see to or answerable for the investigation of the title, or

answerable for a conveyance of land, if the conveyance purports to convey the land in the proper mode, or liable in respect of purchase-money paid by them by direction of the tenant for life to any person joining in the conveyance as a conveying party, or as giving a receipt for the purchase-money, or in any other character, or in respect of any other money paid by them by direction of the tenant for life on the purchase, exchange, partition, or lease.

Trustees' reimbursement.

43. The trustees of a settlement may reimburse themselves or pay and discharge out of the trust property all expenses properly incurred by them.

Reference of differences to Court.

44. If at any time a difference arises between a tenant for life and the trustees of the settlement, respecting the exercise of any of the powers of this Act, or respecting any matter relating thereto, the Court may, on the application of either party, give such directions respecting the matter in difference, and respecting the costs of the application, as the Court thinks fit.

Notice to trustees (*k*).

45.—(1.) A tenant for life, when intending to make a sale, exchange, partition, lease, mortgage, or charge, shall give notice of his intention in that behalf to each of the trustees of the settlement, by posting registered letters, containing the notice, addressed to the trustees, severally, each at his usual or last known place of abode in the United Kingdom, and shall give like notice to the solicitor for the trustees, if any such solicitor is known to the tenant for life, by posting a registered letter, containing the notice, addressed to the solicitor at his place of business in the United Kingdom, every letter under this section being posted not less than one month before the making by the tenant for life of the sale, exchange, partition, lease, mortgage, or charge, or of a contract for the same.

(2.) Provided that at the date of notice given the number of trustees shall not be less than two, unless a contrary intention is expressed in the settlement.

(3.) A person dealing in good faith with the tenant for life is not concerned to inquire respecting the giving of any such notice as is required by this section.

XI.—Court; Land Commissioners; Procedure.

Regulations respecting payments into Court, applications, &c.

46.—(1.) All matters within the jurisdiction of the Court under this Act shall, subject to the Acts regulating the Court, be assigned to the Chancery Division of the Court.

(2.) Payment of money into Court effectually exonerates therefrom the person making the payment.

(*k*) See S. L. A., 1884 (47 & 48 Vict. c. 18), s. 5, and S. L. A., 1890 (53 & 54 Vict. c. 69), s. 7 (1); *ante*, pp. 56, note (*s*), 57, note (*t*).

45 & 46 Vict. c. 38.

(3.) Every application to the Court shall be by petition, or by summons at Chambers.

(4.) On an application by the trustees of a settlement notice shall be served in the first instance on the tenant for life.

(5.) On any application notice shall be served on such persons, if any, as the Court thinks fit.

(6.) The Court shall have full power and discretion to make such order as it thinks fit respecting the costs, charges, or expenses of all or any of the parties to any application, and may, if it thinks fit, order that all or any of those costs, charges, or expenses be paid out of property subject to the settlement.

39 & 40 Vict. c. 59. 44 & 45 Vict. c. 68.

(7.) General Rules for purposes of this Act shall be deemed Rules of Court within section seventeen of the Appellate Jurisdiction Act, 1876, as altered by section nineteen of the Supreme Court of Judicature Act, 1881, and may be made accordingly.

(8.) The powers of the Court may, as regards land in the County Palatine of Lancaster, be exercised also by the Court of Chancery of the County Palatine; and Rules for regulating proceedings in that Court shall be from time to time made by the Chancellor of the Duchy of Lancaster, with the advice and consent of a Judge of the High Court acting in the Chancery Division, and of the Vice-Chancellor of the County Palatine.

(9.) General Rules, and Rules for the Court of Chancery of the County Palatine, may be made at any time after the passing of this Act, to take effect on or after the commencement of this Act.

(10.) The powers of the Court may, as regards land not exceeding in capital value five hundred pounds, or in annual rateable value thirty pounds, and, as regards capital money arising under this Act, and securities in which the same is invested, not exceeding in amount or value five hundred pounds, and as regards personal chattels settled or to be settled, as in this Act mentioned, not exceeding in value five hundred pounds, be exercised by any County Court within the district whereof is situate any part of the land which is to be dealt with in the Court, or from which the capital money to be dealt with in the Court arises under this Act, or in connection with which the personal chattels to be dealt with in the Court are settled.

Payment of costs out of settled property.

47. Where the Court directs that any costs, charges, or expenses be paid out of property subject to a settlement, the same shall, subject and according to the directions of the Court, be raised and paid out of capital money arising under this Act, or other money liable to be laid out in the purchase of land, to be made subject to the settlement, or out of investments representing such money, or out of income of any such money or investments, or out of any accumulations of income of land, money, or investments, or by means of a sale of part of the settled land in respect whereof the costs, charges, or expenses are incurred, or of

other settled land comprised in the same settlement and subject to the same limitations, or by means of a mortgage of the settled land or any part thereof, to be made by such person as the Court directs, and either by conveyance of the fee simple or other estate or interest the subject of the settlement, or by creation of a term, or otherwise, or by means of a charge on the settled land or any part thereof, or partly in one of those modes and partly in another or others, or in any such other mode as the Court thinks fit.

48.—(1.)—(5.) Repealed by the Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30).

Constitution of Land Commissioners; their powers, &c. (*l*)

(6.) The Land Commissioners shall, by virtue of this Act, have, for the purposes of any Act, public, local, personal, or private, passed or to be passed, making provision for the execution of improvements on settled land, all such powers and authorities as they have for the purposes of the Improvement of Land Act, 1864; and the provisions of the last-mentioned Act relating to their proceedings and inquiries, and to authentication of instruments, and to declarations, statements, notices, applications, forms, security for expenses, inspections, and examinations, shall extend and apply, as far as the nature and circumstances of the case admit, to acts and proceedings done or taken by or in relation to the Land Commissioners under any Act making provision as last aforesaid; and the provisions of any Act relating to fees or to security for costs to be taken in respect of the business transacted under the Acts administered by the three several bodies of commissioners aforesaid shall extend and apply to the business transacted by or under the direction of the Land Commissioners under any Act, public, local, personal, or private, passed or to be passed, by which any power or duty is conferred or imposed on them.

27 & 28 Vict. c. 114.

Filing of certificates, &c., of Commissioners (*m*).

49.—(1.) Every certificate and report approved and made by the Land Commissioners under this Act shall be filed in their office.

(2.) An office copy of any certificate or report so filed shall be delivered out of their office to any person requiring the same, on payment of the proper fee, and shall be sufficient evidence of the certificate or report whereof it purports to be a copy.

XII.—Restrictions, Savings, and General Provisions.

Powers not assignable; contract not to exercise powers void (*n*).

50.—(1.) The powers under this Act of a tenant for life are not capable of assignment or release, and do not pass to a person as being, by operation of law or otherwise, an assignee of a tenant for life, and remain exerciseable by the tenant for life after and notwithstanding any

(*l*) See *ante*, p. 54, note (*y*).
(*m*) *Ib.*
(*n*) See S. L. A., 1890 (53 & 54 Vict. c. 69), s. 4.

45 & 46 Vict. c. 38.

assignment, by operation of law or otherwise, of his estate or interest under the settlement.

(2.) A contract by a tenant for life not to exercise any of his powers under this Act is void.

(3.) But this section shall operate without prejudice to the rights of any person being an assignee for value of the estate or interest of the tenant for life; and in that case the assignee's rights shall not be affected without his consent, except that, unless the assignee is actually in possession of the settled land or part thereof, his consent shall not be requisite for the making of leases thereof by the tenant for life, provided the leases are made at the best rent that can reasonably be obtained, without fine, and in other respects are in conformity with this Act.

(4.) This section extends to assignments made or coming into operation before or after and to acts done before or after the commencement of this Act; and in this section assignment includes assignment by way of mortgage, and any partial or qualified assignment, and any charge or incumbrance; and assignee has a meaning corresponding with that of assignment.

Prohibition or limitation against exercise of powers, void (*o*).

51.—(1.) If in a settlement, will, assurance, or other instrument executed or made before or after, or partly before and partly after, the commencement of this Act a provision is inserted purporting or attempting, by way of direction, declaration, or otherwise, to forbid a tenant for life to exercise any power under this Act, or attempting, or tending, or intended, by a limitation, gift, or disposition over of settled land, or by a limitation, gift, or disposition of other real or any personal property, or by the imposition of any condition, or by forfeiture, or in any other manner whatever, to prohibit or prevent him from exercising, or to induce him to abstain from exercising, or to put him into a position inconsistent with his exercising, any power under this Act, that provision as far as it purports, or attempts, or tends, or is intended to have, or would or might have, the operation aforesaid, shall be deemed to be void.

(2.) For the purposes of this section an estate or interest limited to continue so long only as a person abstains from exercising any power shall be and take effect as an estate or interest to continue for the period for which it would continue if that person were to abstain from exercising the power, discharged from liability to determination or cesser by or on his exercising the same.

Provisions against forfeiture.

52. Notwithstanding anything in a settlement, the exercise by the tenant for life of any power under this Act shall not occasion a forfeiture.

Tenant for life trustee for all

53. A tenant for life shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement,

(*o*) See *ante*, p. 57, note (*z*).

and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties.

parties interested (*p*).

54. On a sale, exchange, partition, lease, mortgage, or charge, a purchaser, lessee, mortgagee, or other person dealing in good faith with a tenant for life shall, as against all parties entitled under the settlement, be conclusively taken to have given the best price, consideration, or rent, as the case may require, that could reasonably be obtained by the tenant for life, and to have complied with all the requisitions of this Act.

General protection of purchasers, &c.

55.—(1.) Powers and authorities conferred by this Act on a tenant for life or trustees or the Court or the Land Commissioners (*q*) are exerciseable from time to time.

Exercise of powers; limitation of provisions, &c.

(2.) Where a power of sale, enfranchisement, exchange, partition, leasing, mortgaging, charging, or other power, is exercised by a tenant for life, or by the trustees of a settlement, he and they may respectively execute, make, and do all deeds, instruments, and things necessary or proper in that behalf.

(3.) Where any provision in this Act refers to sale, purchase, exchange, partition, leasing, or other dealing, or to any power, consent, payment, receipt, deed, assurance, contract, expenses, act, or transaction, the same shall be construed to extend only (unless it is otherwise expressed) to sales, purchases, exchanges, partitions, leasings, dealings, powers, consents, payments, receipts, deeds, assurances, contracts, expenses, acts, and transactions under this Act.

56.—(1.) Nothing in this Act shall take away, abridge, or prejudicially affect any power for the time being subsisting under a settlement, or by statute or otherwise, exerciseable by a tenant for life, or by trustees with his consent, or on his request, or by his direction, or otherwise; and the powers given by this Act are cumulative.

Saving for other powers.

(2.) But, in case of conflict between the provisions of a settlement and the provisions of this Act, relative to any matter in respect whereof the tenant for life exercises or contracts or intends to exercise any power under this Act, the provisions of this Act shall prevail; and, accordingly, notwithstanding anything in the settlement, the consent of the tenant for life (*r*) shall, by virtue of this Act, be necessary to the exercise by the trustees of the settlement or other person of any power conferred by the settlement exerciseable for any purpose provided for in this Act.

(3.) If a question arises, or a doubt is entertained, respecting any matter within this section, the Court may, on the application of the trustees of the settlement, or of the tenant for life, or of any other person interested, give its decision, opinion, advice, or direction thereon.

(*p*) See *ante*, p. 52, note (*e*).

(*q*) See *ante*, p. 54, note (*y*).

(*r*) See S. L. A., 1884 (47 & 48 Vict. c. 18), s. 6 (2).

45 & 46 Vict. c. 38.

Additional or larger powers by settlement.

57.—(1.) Nothing in this Act shall preclude a settlor from conferring on the tenant for life, or the trustees of the settlement, any powers additional to or larger than those conferred by this Act.

(2.) Any additional or larger powers so conferred shall, as far as may be, notwithstanding anything in this Act, operate and be exerciseable in the like manner, and with all the like incidents, effects, and consequences, as if they were conferred by this Act, unless a contrary intention is expressed in the settlement.

XIII.—Limited Owners generally (*s*).

Enumeration of other limited owners, to have powers of tenant for life.

58.—(1.) Each person as follows shall, when the estate or interest of each of them is in possession, have the powers of a tenant for life under this Act, as if each of them were a tenant for life as defined in this Act (namely):

(i.) A tenant in tail, including a tenant in tail who is by Act of Parliament restrained from barring or defeating his estate tail, and although the reversion is in the Crown, and so that the exercise by him of his powers under this Act shall bind the Crown, but not including such a tenant in tail where the land in respect whereof he is so restrained was purchased with money provided by Parliament in consideration of public services:

(ii.) A tenant in fee simple, with an executory limitation, gift, or disposition over, on failure of his issue, or in any other event (*t*):

(iii.) A person entitled to a base fee, although the reversion is in the Crown, and so that the exercise by him of his powers under this Act shall bind the Crown:

(iv.) A tenant for years determinable on life, not holding merely under a lease at a rent:

(v.) A tenant for the life of another, not holding merely under a lease at a rent:

(vi.) A tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life, whether by expiration of the estate, or by conditional limitation, or otherwise, or to be defeated by an executory limitation, gift, or disposition over, or is subject to a trust for accumulation of income for payment of debts or other purpose:

(vii.) A tenant in tail after possibility of issue extinct:

(*s*) See *ante*, pp. 51, 58, 59, note (*o*). (45 & 46 Vict. c. 39), s. 10.

(*t*) See the Conveyancing Act, 1882

(viii.) A tenant by the curtesy (*u*):

(ix.) A person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether subject to expenses of management or not, or until sale of the land, or until forfeiture of his interest therein on bankruptcy or other event.

(2.) In every such case, the provisions of this Act referring to a tenant for life, either as conferring powers on him or otherwise, and to a settlement, and to settled land, shall extend to each of the persons aforesaid, and to the instrument under which his estate or interest arises, and to the land therein comprised.

(3.) In any such case any reference in this Act to death as regards a tenant for life shall, where necessary, be deemed to refer to the determination by death or otherwise of such estate or interest as last aforesaid.

XIV.—Infants; Married Women; Lunatics.

Infant absolutely entitled to be as tenant for life.

59. Where a person, who is in his own right seised of or entitled in possession to land, is an infant, then for the purposes of this Act the land is settled land, and the infant shall be deemed tenant for life thereof.

Tenant for life, infant.

60. Where a tenant for life, or a person having the powers of a tenant for life under this Act, is an infant, or an infant would, if he were of full age, be a tenant for life, or have the powers of a tenant for life under this Act, the powers of a tenant for life under this Act may be exercised on his behalf by the trustees of the settlement, and if there are none, then by such person and in such manner as the Court, on the application of a testamentary or other guardian or next friend of the infant, either generally or in a particular instance, orders.

Married woman, how to be affected.

61.—(1.) The foregoing provisions of this Act do not apply in the case of a married woman.

(2.) Where a married woman who, if she had not been a married woman, would have been a tenant for life or would have had the powers of a tenant for life under the foregoing provisions of this Act, is entitled for her separate use, or is entitled under any statute, passed or to be passed, for her separate property, or as a *feme sole*, then she, without her husband, shall have the powers of a tenant for life under this Act.

(3.) Where she is entitled otherwise than as aforesaid, then she and her husband together shall have the powers of a tenant for life under this Act.

(4.) The provisions of this Act referring to a tenant for life and a

(*u*) See the S. L. A., 1884 (47 & 48 Vict. c. 18), s. 8.

45 & 46 Vict. c. 38.

settlement and settled land shall extend to the married woman without her husband, or to her and her husband together, as the case may require, and to the instrument under which her estate or interest arises, and to the land therein comprised.

(5.) The married woman may execute, make, and do all deeds, instruments, and things necessary or proper for giving effect to the provisions of this section.

(6.) A restraint on anticipation in the settlement shall not prevent the exercise by her of any power under this Act.

Tenant for life, lunatic (*x*).

62. Where a tenant for life, or a person having the powers of a tenant for life under this Act, is a lunatic, so found by inquisition, the committee of his estate may, in his name and on his behalf, under an order of the Lord Chancellor, or other person intrusted by virtue of the Queen's Sign Manual with the care and commitment of the custody of the persons and estates of lunatics, exercise the powers of a tenant for life under this Act; and the order may be made on the petition of any person interested in the settled land, or of the committee of the estate.

XV.—Settlement by way of Trusts for Sale.

Provision for case of trust to sell and re-invest in land (*y*).

63.—(1.) Any land, or any estate or interest in land, which under or by virtue of any deed, will, or agreement, covenant to surrender, copy of court roll, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, is subject to a trust or direction for sale of that land, estate, or interest, and for the application or disposal of the money to arise from the sale, or the income of that money, or the income of the land until sale, or any part of that money or income, for the benefit of any person for his life, or any other limited period, or for the benefit of two or more persons concurrently for any limited period, and whether absolutely, or subject to a trust for accumulation of income for payment of debts or other purpose, or to any other restriction, shall be deemed to be settled land, and the instrument or instruments under which the trust arises shall be deemed to be a settlement; and the person for the time being beneficially entitled to the income of the land, estate, or interest aforesaid until sale, whether absolutely or subject as aforesaid, shall be deemed to be tenant for life thereof; or if two or more persons are so entitled concurrently, then those persons shall be deemed to constitute together the tenant for life thereof; and the persons, if any, who are for the time being under the settlement trustees for sale of the settled land, or having power of

(*x*) See *ante*, p. 58, note (*l*).

(*y*) See S. L. A., 1884 (47 & 48 Vict. c. 18), ss. 6 (1), 7; *ante*, p. 80.

consent to, or approval of, or control over the sale, or if under the settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for purposes of this Act are for purposes of this Act trustees of the settlement.

(2.) In every such case the provisions of this Act referring to a tenant for life, and to a settlement, and to settled land, shall extend to the person or persons aforesaid, and to the instrument or instruments under which his or their estate or interest arises, and to the land therein comprised, subject and except as in this section provided (that is to say):

(i.) Any reference in this Act to the predecessors or successors in title of the tenant for life, or to the remaindermen, or reversioners or other persons interested in the settled land, shall be deemed to refer to the persons interested in succession or otherwise in the money to arise from sale of the land, or the income of that money, or the income of the land, until sale (as the case may require).

(ii.) Capital money arising under this Act from the settled land shall not be applied in the purchase of land unless such application is authorized by the settlement in the case of capital money arising thereunder from sales or other dispositions of the settled land, but may, in addition to any other mode of application authorized by this Act, be applied in any mode in which capital money arising under the settlement from any such sale or other disposition is applicable thereunder, subject to any consent required or direction given by the settlement with respect to the application of trust money of the settlement.

(iii.) Capital money arising under this Act from the settled land and the securities in which the same is invested, shall not for any purpose of disposition, transmission, or devolution, be considered as land unless the same would, if arising under the settlement from a sale or disposition of the settled land, have been so considered, and the same shall be held in trust for and shall go to the same persons successively in the same manner, and for and on the same estates, interests, and trusts as the same would have gone and been held if arising under the settlement from a sale or disposition of the settled land, and the income of such capital money and securities shall be paid or applied accordingly.

(iv.) Land of whatever tenure acquired under this Act by purchase, or in exchange, or on partition, shall be conveyed to and vested in the trustees of the settlement, on the trusts, and subject to the powers and provisions which, under the settlement or by reason of the exercise of any power of appointment or charging therein

45 & 46 Vict. c. 38.

contained, are subsisting with respect to the settled land, or would be so subsisting if the same had not been sold, or as near thereto as circumstances permit, but so as not to increase or multiply charges or powers of charging.

XVI.—Repeals.

Repeal of enactments in schedule.

64.—(1.) The enactments described in the schedule to this Act are hereby repealed.

(2.) The repeal by this Act of any enactment shall not affect any right accrued or obligation incurred thereunder before the commencement of this Act; nor shall the same affect the validity or invalidity, or any operation, effect, or consequence, of any instrument executed or made, or of anything done or suffered, or of any order made, before the commencement of this Act; nor shall the same affect any action, proceeding, or thing then pending or uncompleted; and every such action, proceeding, and thing may be carried on and completed as if there had been no such repeal in this Act.

XVII.—Ireland.

Modifications respecting Ireland.

65.—(1.) In the application of this Act to Ireland the foregoing provisions shall be modified as in this section provided.

(2.) The Court shall be Her Majesty's High Court of Justice in Ireland.

(3.) All matters within the jurisdiction of that Court shall, subject to the Acts regulating that Court, be assigned to the Chancery Division of that Court; but General Rules under this Act for Ireland may direct that those matters or any of them be assigned to the Land Judges of that Division.

(4.) Any deed inrolled under this Act shall be inrolled in the Record and Writ Office of that Division.

40 & 41 Vict. c. 57.

(5.) General Rules for purposes of this Act for Ireland shall be deemed Rules of Court within the Supreme Court of Judicature Act (Ireland), 1877, and may be made accordingly, at any time after the passing of this Act, to take effect on or after the commencement of this Act.

(6.) The several Civil Bill Courts in Ireland shall, in addition to the jurisdiction possessed by them independently of this Act, have and exercise the power and authority exerciseable by the Court under this Act, in all proceedings where the property, the subject of the proceedings, does not exceed in capital value five hundred pounds, or in annual value thirty pounds.

40 & 41 Vict. c. 56.

(7.) The provisions of Part II. of the County Officers and Courts

(Ireland) Act, 1877, relative to the equitable jurisdiction of the Civil Bill Courts, shall apply to the jurisdiction exerciseable by those Courts under this Act. 45 & 46 Vict. c. 38.

(8.) Rules and Orders for purposes of this Act, as far as it relates to the Civil Bill Courts, may be made at any time after the passing of this Act, to take effect on or after the commencement of this Act, in manner prescribed by section seventy-nine of the County Officers and Courts (Ireland) Act, 1877.

(9.) The Commissioners of Public Works in Ireland shall be substituted for the Land Commissioners.

(10.) The term for which a lease other than a building or mining lease may be granted shall be not exceeding thirty-five years.

THE SCHEDULE.

REPEALS. S. 64.

23 & 24 Vict. c. 145 in part.	An Act to give to trustees, mortgagees, and others, certain powers now commonly inserted in settlements, mortgages, and wills . . . . in part; namely,—
	Parts I. and IV. (being so much of the Act as is not repealed by the Conveyancing and Law of Property Act, 1881).
27 & 28 Vict. c. 114 in part.	The Improvement of Land Act, 1864 - in part; namely,— Sections seventeen and eighteen: Section twenty-one, from "either by a party" to "benefice) or" (inclusive); and from "or if the land owner" to "minor or minors" (inclusive); and "or circumstance" (twice): Except as regards Scotland.
40 & 41 Vict. c. 18 in part.	The Settled Estates Act, 1877 - in part; namely,— Section seventeen.

47 & 48 Vict. c. 18.

THE SETTLED LAND ACT, 1884.

[47 & 48 VICT. CH. 18.]

An Act to Amend the Settled Land Act, 1882.

[3rd July, 1884.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Short title.

1. This Act may be cited as the Settled Land Act, 1884.

Interpretation.

2. The expression "the Act of 1882" used in this Act means the Settled Land Act, 1882.

Construction of Act.

3. The Act of 1882 and this Act are to be read and construed together as one Act, and expressions used in this Act are to have the same meanings as those attached by the Act of 1882 to similar expressions used therein.

Fine on a lease to be capital money.

4. A fine received on the grant of a lease under any power conferred by the Act of 1882 is to be deemed capital money arising under that Act.

Notice under 45 & 46 Vict. c. 38, s. 45, may, as to a sale, exchange, partition, or lease, be general.

5.—(1.) The notice required by section forty-five of the Act of 1882 of intention to make a sale, exchange, partition, or lease may be notice of a general intention in that behalf.

(2.) The tenant for life is, upon request by a trustee of the settlement, to furnish to him such particulars and information as may reasonably be required by him from time to time with reference to sales, exchanges, partitions, or leases effected, or in progress, or immediately intended.

(3.) Any trustee, by writing under his hand, may waive notice either in any particular case, or generally, and may accept less than one month's notice.

(4.) This section applies to a notice given before, as well as to a notice given after, the passing of this Act.

(5.) Provided that a notice, to the sufficiency of which objection has been taken before the passing of this Act, is not made sufficient by virtue of this Act.

As to consents of tenants for life (z).

6.—(1.) In the case of a settlement within the meaning of section sixty-three of the Act of 1882, any consent not required by the terms of the settlement is not by force of anything contained in that Act to be deemed necessary to enable the trustees of the settlement, or any other person, to execute any of the trusts or powers created by the settlement.

(2.) In the case of every other settlement, not within the meaning of

(z) See *ante*, p. 80.

section sixty-three of the Act of 1882, where two or more persons together constitute the tenant for life for the purposes of that Act, then, notwithstanding anything contained in subsection (2) of section fifty-six of that Act, requiring the consent of all those persons, the consent of one only of those persons is by force of that section to be deemed necessary to the exercise by the trustees of the settlement, or by any other person, of any power conferred by the settlement exerciseable for any purpose provided for in that Act. 47 & 48 Vict. c. 18.

(3.) This section applies to dealings before, as well as after, the passing of this Act.

Powers given by s. 63 to be exercised only with leave of the Court.

7. With respect to the powers conferred by section sixty-three of the Act of 1882, the following provisions are to have effect:—

(i.) Those powers are not to be exercised without the leave of the Court.

(ii.) The Court may by order, in any case in which it thinks fit, give leave to exercise all or any of those powers, and the order is to name the person or persons to whom leave is given.

(iii.) The Court may from time to time rescind, or vary, any order made under this section, or may make any new or further order.

(iv.) So long as an order under this section is in force, neither the trustees of the settlement, nor any person other than a person having the leave, shall execute any trust or power created by the settlement, for any purpose for which leave is by the order given, to exercise a power conferred by the Act of 1882.

(v.) An order under this section may be registered and re-registered, as a lis pendens, against the trustees of the settlement named in the order, describing them on the register as "Trustees for the purposes of the Settled Land Act, 1882."

(vi.) Any person dealing with the trustees from time to time, or with any other person acting under the trusts or powers of the settlement, is not to be affected by an order under this section, unless and until the order is duly registered, and when necessary re-registered as a lis pendens (*a*).

(vii.) An application to the Court under this section may be made by the tenant for life, or by the persons who together constitute the tenant for life, within the meaning of section sixty-three of the Act of 1882.

(viii.) An application to rescind or vary an order, or to make any new or further order under this section, may be made also by the trustees of the settlement, or by any person beneficially interested under the settlement.

(ix.) The person or persons to whom leave is given by an order under this section, shall be deemed the proper person or persons to exercise

(*a*) As to *lis pendens*, see *ante*, p. 108.

47 & 48 Vict. c. 18.

the powers conferred by section sixty-three of the Act of 1882, and shall have, and may exercise those powers accordingly.

(x.) This section is not to affect any dealing which has taken place before the passing of this Act, under any trust or power to which this section applies.

Curtesy to be deemed to arise under settlement.

8. For the purposes of the Act of 1882 the estate of a tenant by the curtesy is to be deemed an estate arising under a settlement made by his wife.

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50 & 51 Vict. c. 30.

THE SETTLED LAND ACTS (AMENDMENT) ACT, 1887.

[50 & 51 VICT. CH. 30.]

An Act to amend the Settled Land Act, 1882.

[23rd August, 1887.]

45 & 46 Vict. c. 38.

WHEREAS by the twenty-first section of the Settled Land Act, 1882 (in this Act referred to as the Act of 1882), it is provided that capital money arising under that Act may be applied in payment for any improvement by that Act authorized:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and the Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Amendment of s. 21 of the Settled Land Act, 1882.

1. Where any improvement of a kind authorized by the Act 1882 has been or may be made either before or after the passing of this Act, and a rentcharge, whether temporary or perpetual, has been or may be created in pursuance of any Act of Parliament, with the object of paying off any moneys advanced for the purpose of defraying the expenses of such improvement, any capital money expended in redeeming such rentcharge, or otherwise providing for the payment thereof, shall be deemed to be applied in payment for an improvement authorized by the Act of 1882.

Section 28 of Settled Land Act, 1882, to apply to improvements within preceding section.

2. Any improvement in payment for which capital money is applied or deemed to be applied under the provisions of the preceding section shall be deemed to be an improvement within the meaning of section twenty-eight of the Act of 1882, and the provisions of such last-mentioned section shall, so far as applicable, be deemed to apply to such improvement.

Short title.

3. This Act shall be construed as one with the Settled Land Act, 1882, and the Settled Land Act, 1884, and may be cited together with those Acts as the Settled Land Acts, 1882 to 1887, and separately as the Settled Land Acts (Amendment) Act, 1887.

THE SETTLED LAND ACT, 1889.

52 & 53 Vict. c. 36.

[52 & 53 VICT. CH. 36.]

An Act to amend the Settled Land Act, 1882.

[12th August, 1889.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows :

Construction and short title.

1. This Act shall be construed as one with the Settled Land Acts, 1882 to 1887, and may be cited together with those Acts, as the Settled Land Acts, 1882 to 1889, and separately as the Settled Land Act, 1889.

Option of purchase in building lease. 45 & 46 Vict. c. 38.

2. Any building lease, and any agreement for granting building leases, under the Settled Land Act, 1882 (*b*), may contain an option to be exercised at any time within an agreed number of years not exceeding ten, for the lessee to purchase the land leased at a price fixed at the time of the making of the lease or agreement for the lease, such price to be the best which having regard to the rent reserved can reasonably be obtained, and to be either a fixed sum of money or such a sum of money as shall be equal to a stated number of years purchase of the highest rent reserved by the lease or agreement.

Price to be capital money.

3. Such price when received shall for all purposes be capital money arising under the Settled Land Act, 1882.

THE SETTLED LAND ACT, 1890.

53 & 54 Vict. c. 69.

[53 & 54 VICT. CH. 69.]

An Act to amend the Settled Land Acts, 1882 *to* 1889.

[18th August, 1890.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Preliminary.

Short title.

1. This Act may be cited as the Settled Land Act, 1890.

Acts to be construed together.

2. The Settled Land Acts, 1882 to 1889, and this Act are to be read

(*b*) See 45 & 46 Vict. c. 38, ss. 6—10, 31 (iii.).

53 & 54 Vict. c. 69.

and construed together as one Act, and may be cited as the Settled Land Acts, 1882 to 1890.

Interpretation.

3. Expressions used in this Act are to have the same meanings as those attached by the Settled Land Acts, 1882 to 1889, to similar expressions used therein.

Definitions.

Instrument in consideration of marriage, &c., to be part of the settlement.

4.—(1.) Every instrument whereby a tenant for life, in consideration of marriage or as part or by way of any family arrangement, not being a security for payment of money advanced, makes an assignment of or creates a charge upon his estate or interest under the settlement is to be deemed one of the instruments creating the settlement, and not an instrument vesting in any person any right as assignee for value within the meaning or operation of section fifty of the Act of 1882.

45 & 46 Vict. c. 38.

(2.) This section is to apply and have effect with respect to every disposition before as well as after the passing of this Act, unless inconsistent with the nature or terms of the disposition.

Exchanges (*c*).

Creation of easements on exchange or partition.

5. On an exchange or partition any easement, right, or privilege of any kind may be reserved or may be granted over or in relation to the settled land or any part thereof, or other land or an easement, right, or privilege of any kind may be given, or taken in exchange or on partition for land or for any other easement, right, or privilege of any kind.

Completion of Contracts.

Power to complete predecessor's contract.

6. A tenant for life may make any conveyance which is necessary or proper for giving effect to a contract entered into by a predecessor in title, and which if made by such predecessor would have been valid as against his successors in title.

Leases (*d*).

Provision as to leases for 21 years.

7. A lease for a term not exceeding twenty-one years at the best rent that can be reasonably obtained without fine, and whereby the lessee is not exempted from punishment for waste, may be made by a tenant for life—

(i.) Without any notice of an intention to make the same having been given under section forty-five of the Act of 1882; and

45 & 46 Vict. c. 38.

(*c*) See *ante*, p. 52.

(*d*) As to tenant for life's power of leasing, see *ante*, pp. 55, 56, 500, *et seq.*

(ii.) Notwithstanding that there are no trustees of the settlement for the purposes of the Settled Land Acts, 1882 to 1890; and 53 & 54 Vict. c. 69.

(iii.) By any writing under hand only containing an agreement instead of a covenant by the lessee for payment of rent in cases where the term does not extend beyond three years from the date of the writing.

Provision as to mining leases.

8. In a mining lease—

(i.) The rent may be made to vary according to the price of the minerals or substances gotten, or any of them:

(ii.) Such price may be the saleable value, or the price or value appearing in any trade or market or other price list or return from time to time, or may be the marketable value as ascertained in any manner prescribed by the lease (including a reference to arbitration), or may be an average of any such prices or values taken during a specified period.

Power to reserve a rentcharge on a grant in fee simple.

9. Where, on a grant for building purposes by a tenant for life, the land is expressed to be conveyed in fee simple with or subject to a reservation thereout of a perpetual rent or rentcharge, the reservation shall operate to create a rentcharge in fee simple issuing out of the land conveyed, and having incidental thereto all powers and remedies for recovery thereof conferred by section forty-four of the Conveyancing and Law of Property Act, 1881, and the rentcharge so created shall go and remain to the uses on the trusts and subject to the powers and provisions which, immediately before the conveyance, were subsisting with respect to the land out of which it is reserved. 44 & 45 Vict. c. 41.

Mansion and Park.

Restriction on sale of mansion (*e*).

10.—(1.) From and after the passing of this Act section fifteen of the Act of 1882, relating to the sale or leasing of the principal mansion house, shall be and the same is hereby repealed.

(2.) Notwithstanding anything contained in the Act of 1882, the principal mansion house (if any) on any settled land, and the pleasure grounds and park and lands (if any) usually occupied therewith, shall not be sold, exchanged, or leased by the tenant for life without the consent of the trustees of the settlement or an order of the Court.

(3.) Where a house is usually occupied as a farmhouse, or where the site of any house and the pleasure grounds and park and lands (if any) usually occupied therewith do not together exceed twenty-five acres in extent, the house is not to be deemed a principal mansion house within the meaning of this section.

The Raising of Money.

Power to raise money by mortgage (*f*).

11.—(1) Where money is required for the purpose of discharging an incumbrance on the settled land or part thereof, the tenant for life may

(*e*) See *ante*, p. 53, note (*h*).

(*f*) See *ante*, p. 56, note (*s*).

53 & 54 Vict. c. 69.

raise the money so required, and also the amount properly required for payment of the costs of the transaction on mortgage of the settled land, or of any part thereof, by conveyance of the fee simple or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or any part thereof, or otherwise, and the money so raised shall be capital money for that purpose, and may be paid or applied accordingly.

(2.) Incumbrance in this section does not include any annual sum payable only during a life or lives or during a term of years absolute or determinable.

Dealings as between Tenant for Life and the Estate.

Provision enabling dealings with tenant for life.

12. Where a sale of settled land is to be made to the tenant for life, or a purchase is to be made from him of land to be made subject to the limitations of the settlement, or an exchange is to be made with him of settled land for other land, or a partition is to be made with him of land an undivided share whereof is subject to the limitations of the settlement, the trustees of the settlement shall stand in the place of and represent the tenant for life, and shall, in addition to their powers as trustees, have all the powers of the tenant for life in reference to negotiating and completing the transaction.

Application of Capital Money.

Application of capital money (*g*).

13. Improvements authorized by the Act of 1882 shall include the following; namely,

(i.) Bridges;

(ii.) Making any additions to or alterations in buildings reasonably necessary or proper to enable the same to be let;

(iii.) Erection of buildings in substitution for buildings within an urban sanitary district taken by a local or other public authority, or for buildings taken under compulsory powers, but so that no more money be expended than the amount received for the buildings taken and the site thereof;

(iv.) The rebuilding of the principal mansion house on the settled land: Provided that the sum to be applied under this sub-section shall not exceed one half of the annual rental of the settled land.

Capital money in Court may be paid out to trustees.

14. All or any part of any capital money paid into Court may, if the Court thinks fit, be at any time paid out to the trustees of the settlement for the purposes of the Settled Land Acts, 1882 to 1890.

Court may order payment

15. The Court may, in any case where it appears proper, make an order directing or authorizing capital money to be applied in or towards

(*g*) As to improvements, see *ante*, pp. 48, 49, 54, 510.

payment for any improvement authorized by the Settled Land Acts, 1882 to 1890, notwithstanding that a scheme was not, before the execution of the improvement, submitted for approval, as required by the Act of 1882, to the trustees of the settlement or to the Court.

53 & 54 Vict. c. 69.

for improvements executed (*h*).

Trustees.

16. Where there are for the time being no trustees of the settlement within the meaning and for the purposes of the Act of 1882 (*i*) then the following persons shall, for the purposes of the Settled Land Acts, 1882 to 1890, be trustees of the settlement; namely,

Trustees for the purposes of the Act.

(i.) The persons (if any) who are for the time being under the settlement trustees, with power of or upon trust for sale of any other land comprised in the settlement and subject to the same limitations as the land to be sold, or with power of consent to or approval of the exercise of such a power of sale, or, if there be no such persons, then

(ii.) The persons (if any) who are for the time being under the settlement trustees with future power of sale, or under a future trust for sale of the land to be sold, or with power of consent to or approval of the exercise of such a future power of sale, and whether the power or trust takes effect in all events or not.

17. Repealed by the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 51, and replaced by s. 47.

18. The provisions of section eleven (*k*) of the Housing of the Working Classes Act, 1885, and of any enactment which may be substituted therefor, shall have effect as if the expression "working classes" included all classes of persons who earn their livelihood by wages or salaries: Provided that this section shall apply only to buildings of a rateable value not exceeding one hundred pounds per annum.

Extension of meaning of "working classes" in 48 & 49 Vict. c. 72.

19. The registration of a writ or order affecting land may be vacated pursuant to an order of the High Court or any judge thereof.

Power to vacate registration of writ.

(*h*) See *ante*, p. 55, note (*a*).

(*i*) See 45 & 46 Vict. c. 38, s. 2 (8).

(*k*) By the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70). this section is among others repealed and other provisions are substituted, see s. 74.

45 & 46 Vict. c. 75.

THE MARRIED WOMEN'S PROPERTY ACT, 1882.

[45 & 46 VICT. CH. 75.]

An Act to consolidate and amend the Acts relating to the Property of Married Women. [18th August, 1882.]

WHEREAS it is expedient to consolidate and amend the Act of the thirty-third and thirty-fourth Victoria, chapter ninety-three, intituled "The Married Women's Property Act, 1870," and the Act of the thirty-seventh and thirty-eighth Victoria, chapter fifty, intituled "An Act to amend the Married Women's Property Act (1870)":

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Married woman to be capable of holding property and of contracting as a *feme sole* (*l*).

1.—(1.) A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property (*m*), in the same manner as if she were a *feme sole*, without the intervention of any trustee.

(2.) A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract (*n*), and of suing and being sued, either in contract or in tort (*nn*), or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her: and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise.

(3.) and (4.) Repealed by the M. W. P. Act, 1893 (56 & 57 Vict. c. 63), s. 4, and replaced by s. 1.

(5.) Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a *feme sole* (*o*).

Property of a woman married after the Act to be held by her as a *feme sole* (*p*).

2. Every woman who marries after the commencement of this Act shall be entitled to have and to hold as her separate property and to dispose of in manner aforesaid all real and personal property which shall

(*l*) See *ante*, p. 126.

(*m*) This does not apply to property of which the married woman is trustee; *Harkness and Allsopp's Contract*, [1896] 2 Ch. 358.

(*n*) See the M. W. P. Act, 1893 (56 & 57 Vict. c. 63), s. 1, and *ante*, pp. 131—133.

(*nn*) See *ante*, p. 132, note (*e*).

(*o*) *Ante*, p. 133, note (*n*).

(*p*) See *ante*, p. 126, note (*q*).

belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation, in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill.

Loans by wife to husband.

3. Any money or other estate of the wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him, or otherwise, shall be treated as assets of her husband's estate in case of his bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the amount or value of such money or other estate after, but not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied.

Execution of general power.

4. The execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act.

Property acquired after the Act by a woman married before the Act to be held by her as a *feme sole* (*q*).

5. Every woman married before the commencement of this Act shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act, including any wages, earnings, money, and property so gained or acquired by her as aforesaid.

As to stock, &c., to which a married woman is entitled.

6. All deposits in any post office or other savings bank, or in any other bank, all annuities granted by the Commissioners for the Reduction of the National Debt or by any other person, and all sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Governor and Company of the Bank of England, or of any other bank, which at the commencement of this Act are standing in the sole name of a married woman, and all shares, stock, debentures, debenture stock, or other interests of or in any corporation, company, or public body, municipal, commercial, or otherwise, or of or in any industrial, provident, friendly, benefit, building, or loan society, which at the commencement of this Act are standing in her name, shall be deemed, unless and until the contrary be shown, to be the separate property of such married woman; and the fact that any such deposit, annuity, sum forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Governor and Company of the Bank of England or of any other bank, share, stock, debenture, debenture stock, or other interest as aforesaid, is standing in the sole name of a married woman shall be sufficient *primâ facie* evidence that she is beneficially entitled thereto for her separate use, so as to

(*q*) But see s. 19, and *ante*, p. 127, note (*t*).

45 & 46 Vict. c. 75.

authorize and empower her to receive or transfer the same, and to receive the dividends, interests, and profits thereof, without the concurrence of her husband, and to indemnify the Postmaster General, the Commissioners for the Reduction of the National Debt, the Governor and Company of the Bank of England, the Governor and Company of the Bank of Ireland, and all directors, managers, and trustees of every such bank, corporation, company, public body, or society as aforesaid, in respect thereof.

As to stock, &c., to be transferred, &c., to a married woman.

7. All sums forming part of the public stocks or funds (*r*), or of any other stocks or funds transferable in the books of the Bank of England or of any other bank, and all such deposits and annuities respectively as are mentioned in the last preceding section, and all shares, stock, debentures, debenture stock, and other interests of or in any such corporation, company, public body, or society as aforesaid, which after the commencement of this Act shall be allotted to or placed, registered, or transferred in or into or made to stand in the sole name of any married woman shall be deemed, unless and until the contrary be shown, to be her separate property, in respect of which so far as any liability may be incident thereto her separate estate shall alone be liable, whether the same shall be so expressed in the document whereby her title to the same is created or certified, or in the books or register wherein her title is entered or recorded, or not.

Provided always, that nothing in this Act shall require or authorize any corporation or joint stock company to admit any married woman to be a holder of any shares or stock therein to which any liability may be incident, contrary to the provisions of any Act of Parliament, charter, byelaw, articles of association, or deed of settlement regulating such corporation or company.

Investments in joint names of married women and others.

8. All the provisions herein-before contained as to deposits in any post office or other savings bank, or in any other bank, annuities granted by the Commissioners for the Reduction of the National Debt or by any other person, sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Bank of England or of any other bank, shares, stock, debentures, debenture stock, or other interests of or in any such corporation, company, public body, or society as aforesaid respectively, which at the commencement of this Act shall be standing in the sole name of a married woman, or which, after that time, shall be allotted to, or placed, registered, or transferred to or into, or made to stand in, the sole name of a married woman, shall respectively extend and apply, so far as relates to the estate, right, title, or interest of the married woman, to any of the particulars aforesaid which, at the commencement of this Act, or at any time afterwards, shall be

(*r*) These words include capital stock issued by the Secretary of State, and charged on the revenues of India, 56 & 57 Vict. c. 70, s. 21.

standing in, or shall be allotted to, placed, registered, or transferred to or into, or made to stand in, the name of any married woman jointly with any persons or person other than her husband.

As to stock, &c., standing in the joint names of a married woman and others.

9. It shall not be necessary for the husband of any married woman, in respect of her interest, to join in the transfer of any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society as aforesaid, which is now or shall at any time hereafter be standing in the sole name of any married woman, or in the joint names of such married woman and any other person or persons not being her husband.

Fraudulent investments with money of husband.

10. If any investment in any such deposit or annuity as aforesaid, or in any of the public stocks or funds, or in any other stocks or funds transferable as aforesaid, or in any share, stock, debenture, or debenture stock of any corporation, company, or public body, municipal, commercial, or otherwise, or in any share, debenture, benefit, right, or claim whatsoever in, to, or upon the funds of any industrial, provident, friendly, benefit, building, or loan society, shall have been made by a married woman by means of moneys of her husband, without his consent, the Court may, upon an application under section seventeen of this Act, order such investment, and the dividends thereof, or any part thereof, to be transferred and paid respectively to the husband; and nothing in this Act contained shall give validity as against creditors of the husband to any gift, by a husband to his wife, of any property, which, after such gift, shall continue to be in the order and disposition or reputed ownership of the husband, or to any deposit or other investment of moneys of the husband made by or in the name of his wife in fraud of his creditors; but any moneys so deposited or invested may be followed as if this Act had not passed.

Moneys payable under policy of assurance not to form part of estate of the insured.

11. A married woman may by virtue of the power of making contracts herein-before contained effect a policy upon her own life or the life of her husband for her separate use; and the same and all benefit thereof shall enure accordingly.

A policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, or by any woman on her own life, and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts: Provided, that if it shall be proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured, they

45 & 46 Vict. c. 75.

shall be entitled to receive, out of the moneys payable under the policy, a sum equal to the premiums so paid. The insured may by the policy, or by any memorandum under his or her hand, appoint a trustee or trustees of the moneys payable under the policy, and from time to time appoint a new trustee or new trustees thereof, and may make provision for the appointment of a new trustee or new trustees thereof, and for the investment of the moneys payable under any such policy. In default of any such appointment of a trustee, such policy, immediately on its being effected, shall vest in the insured, and his or her legal personal representatives, in trust for the purposes aforesaid. If, at the time of the death of the insured, or at any time afterwards, there shall be no trustee, or it shall be expedient to appoint a new trustee or new trustees, a trustee or trustees or a new trustee or new trustees may be appointed by any court having jurisdiction under the provisions of the Trustee Act, 1850, or the Acts amending and extending the same (*s*). The receipt of a trustee or trustees duly appointed, or, in default of any such appointment, or in default of notice to the insurance office, the receipt of the legal personal representative of the insured shall be a discharge to the office for the sum secured by the policy, or for the value thereof, in whole or in part.

13 & 14 Vict. c. 60.

Remedies of married woman for protection and security of separate property (*t*).

12. Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject, as regards her husband, to the proviso herein-after contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a *feme sole*, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. In any indictment or other proceeding under this section it shall be sufficient to allege such property to be her property; and in any proceeding under this section a husband or wife shall be competent to give evidence against each other, any statute or rule of law to the contrary notwithstanding: Provided always, that no criminal proceeding shall be taken by any wife against her husband by virtue of this Act while they are living together, as to or concerning any property claimed by her, nor while they are living apart, as to or concerning any act done by the husband while they were living together, concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert, his wife.

Wife's ante-nuptial debts and liabilities.

13. A woman after her marriage shall continue to be liable in respect and to the extent of her separate property for all debts contracted, and all contracts entered into or wrongs committed by her before her marriage,

(*s*) Now the Trustee Act, 1893 (56 & 57 Vict. c. 53).

(*t*) See *ante*, p. 128, note (*e*).

including any sums for which she may be liable as a contributory, either before or after she has been placed on the list of contributories, under and by virtue of the Acts relating to joint stock companies; and she may be sued for any such debt and for any liability in damages or otherwise under any such contract, or in respect of any such wrong; and all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property; and, as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable for all such debts, contracts, or wrongs, and for all damages or costs recovered in respect thereof: Provided always, that nothing in this Act shall operate to increase or diminish the liability of any woman married before the commencement of this Act for any such debt, contract, or wrong, as aforesaid, except as to any separate property to which she may become entitled by virtue of this Act, and to which she would not have been entitled for her separate use under the Acts hereby repealed or otherwise, if this Act had not passed.

Husband to be liable for his wife's debts contracted before marriage to a certain extent.

14. A husband shall be liable for the debts of his wife contracted, and for all contracts entered into and wrongs committed by her, before marriage, including any liabilities to which she may be so subject under the Acts relating to joint stock companies as aforesaid, to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been *bonâ fide* recovered against him in any proceeding at law, in respect of any such debts, contracts, or wrongs for or in respect of which his wife was liable before her marriage as aforesaid; but he shall not be liable for the same any further or otherwise; and any court in which a husband shall be sued for any such debt shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount, or value of such property: Provided always, that nothing in this Act contained shall operate to increase or diminish the liability of any husband married before the commencement of this Act for or in respect of any such debt or other liability of his wife as aforesaid.

Suits for ante-nuptial liabilities.

15. A husband and wife may be jointly sued in respect of any such debt or other liability (whether by contract or for any wrong) contracted or incurred by the wife before marriage as aforesaid, if the plaintiff in the action shall seek to establish his claim, either wholly or in part, against both of them; and if in any such action, or in any action brought in respect of any such debt or liability against the husband alone, it is not found that the husband is liable in respect of any property of the wife so acquired by him or to which he shall have become so entitled as aforesaid, he shall have judgment for his costs of defence, whatever may be the result of the action against the wife if jointly sued

45 & 46 Vict. c. 75.

with him; and in any such action against husband and wife jointly, if it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband personally and against the wife as to her separate property; and as to the residue, if any, of such debt and damages, the judgment shall be a separate judgment against the wife as to her separate property only.

Act of wife liable to criminal proceedings (*tt*).

16. A wife doing any act with respect to any property of her husband, which, if done by the husband with respect to property of the wife, would make the husband liable to criminal proceedings by the wife under this Act, shall in like manner be liable to criminal proceedings by her husband.

Questions between husband and wife as to property to be decided in a summary way.

17. In any question between husband and wife as to the title to or possession of property, either party, or any such bank, corporation, company, public body, or society as aforesaid in whose books any stocks, funds or shares of either party are standing, may apply by summons or otherwise in a summary way to any judge of the High Court of Justice in England or in Ireland, according as such property is in England or Ireland, or (at the option of the applicant irrespectively of the value of the property in dispute) in England to the judge of the county court of the district, or in Ireland to the chairman of the civil bill court of the division in which either party resides, and the judge of the High Court of Justice or of the county court, or the chairman of the civil bill court (as the case may be) may make such order with respect to the property in dispute, and as to the costs of and consequent on the application as he thinks fit, or may direct such application to stand over from time to time, and any inquiry touching the matters in question to be made in such manner as he shall think fit: Provided always, that any order of a judge of the High Court of Justice to be made under the provisions of this section shall be subject to appeal in the same way as an order made by the same judge in a suit pending or on an equitable plaint in the said court would be; and any order of a county or civil bill court under the provisions of this section shall be subject to appeal in the same way as any other order made by the same court would be, and all proceedings in a county court or civil bill court under this section in which, by reason of the value of the property in dispute, such court would not have had jurisdiction if this Act or the Married Women's Property Act, 1870, had not passed, may, at the option of the defendant or respondent to such proceedings, be removed as of right into the High Court of Justice in England or Ireland (as the case may be), by writ of

(*tt*) The husband and wife are in such proceedings respectively made competent and admissible witnesses, and, except when defendant, compellable to give evidence by the Married Women's Property Act, 1884 (47 Vict. c. 14).

certiorari or otherwise as may be prescribed by any rule of such High Court; but any order made or act done in the course of such proceedings prior to such removal shall be valid, unless order shall be made to the contrary by such High Court: Provided also, that the judge of the High Court of Justice or of the county court, or the chairman of the civil bill court, if either party so require, may hear any such application in his private room: Provided also, that any such bank, corporation, company, public body, or society as aforesaid, shall, in the matter of any such application for the purposes of costs or otherwise, be treated as a stakeholder only.

Married woman as an executrix or trustee.

18. A married woman who is an executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person, or a trustee alone or jointly as aforesaid of property subject to any trust, may sue or be sued, and may transfer or join in transferring any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society in that character, without her husband, as if she were a *feme sole*.

Saving of existing settlements, and the power to make future settlements.

19. Nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made (*u*) whether before or after marriage, respecting the property of any married woman, or shall interfere with or render inoperative any restriction against anticipation at present attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument; but no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage (*x*), and no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors.

Married woman to be liable to the parish for the maintenance her husband.

20. Where in England the husband of any woman having separate property becomes chargeable to any union or parish, the justices having jurisdiction in such union or parish may, in petty sessions assembled, upon application of the guardians of the poor, issue a summons against the wife, and make and enforce such order against her for the maintenance of her husband out of such separate property as by the thirty-third section of the Poor Law Amendment Act, 1868, they may now make and enforce against a husband for the maintenance of his wife if she becomes chargeable to any union or parish. Where in Ireland

31 & 32 Vict. c. 122.

(*u*) See *ante*, p. 127, note (*t*).

(*x*) See *ante*, p. 129, note (*m*).

45 & 46 Vict. c. 75.

relief is given under the provisions of the Act relating to the relief of the destitute poor to the husband of any woman having separate property, the cost price of such relief is hereby declared to be a loan from the guardians of the union in which the same shall be given, and shall be recoverable from such woman as if she were a *feme sole* by the same actions and proceedings as money lent.

Married woman to be liable to the parish for the maintenance of her children.

21. A married woman having separate property shall be subject to all such liability for the maintenance of her children and grandchildren as the husband is now by law subject to for the maintenance of her children and grandchildren: Provided always, that nothing in this Act shall relieve her husband from any liability imposed upon him by law to maintain her children or grandchildren.

Repeal of 33 & 34 Vict. c. 93. 37 & 38 Vict. c. 50.

22. The Married Women's Property Act, 1870, and the Married Women's Property Act, 1870, Amendment Act, 1874, are hereby repealed: Provided that such repeal shall not affect any act done or right acquired while either of such Acts was in force, or any right or liability of any husband or wife, married before the commencement of this Act, to sue or be sued under the provisions of the said repealed Acts or either of them, for or in respect of any debt, contract, wrong, or other matter or thing whatsoever, for or in respect of which any such right or liability shall have accrued to or against such husband or wife before the commencement of this Act.

Legal representative of married woman.

23. For the purposes of this Act the legal personal representative of any married woman shall in respect of her separate estate have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living.

Interpretation of terms.

24. The word "contract" in this Act shall include the acceptance of any trust, or of the office of executrix or administratrix, and the provisions of this Act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust (*y*) or *devastavit* committed by any married woman being a trustee or executrix or administratrix either before or after her marriage, and her husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration. The word "property" in this Act includes a thing in action.

Commencement of Act.

25. The date of the commencement of this Act shall be the first of January one thousand eight hundred and eighty-three.

Extent of Act.

26. This Act shall not extend to Scotland.

Short title.

27. This Act may be cited as the Married Women's Property Act, 1882.

(*y*) See *ante*, p. 132, note (*d*).

THE MARRIED WOMEN'S PROPERTY ACT, 1893.

56 & 57 Vict. c. 63.

[56 & 57 VICT. CH. 63.]

An Act to amend the Married Women's Property Act, 1882.

[5th December, 1893.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Effect of contracts by married women.

1. Every contract hereafter entered into by a married woman, otherwise than as agent,

(a) shall be deemed to be a contract entered into by her with respect to and to bind her separate property whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract ;

(b) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to ; and

(c) shall also be enforceable by process of law against all property which she may thereafter while discovert be possessed of or entitled to :

Provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating.

Costs may be ordered to be paid out of property subject to restraint on anticipation.

2. In any action or proceeding now or hereafter instituted by a woman or by a next friend on her behalf, the court before which such action or proceeding is pending shall have jurisdiction by judgment or order from time to time to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver and the sale of the property or otherwise as may be just.

Will of married woman.

3. Section twenty-four of the Wills Act, 1837, shall apply to the will of a married woman made during coverture whether she is or is not possessed of or entitled to any separate property at the time of making it, and such will shall not require to be re-executed or republished after the death of her husband.

4. Sub-sections (3) and (4) of section one of the Married Women's Property Act, 1882, are hereby repealed.

5. This Act may be cited as the Married Women's Property Act, 1893.

6. This Act shall not apply to Scotland.

56 & 57 Vict. c. 53.

THE TRUSTEE ACT, 1893 (z).

[56 & 57 VICT. CH. 53.]

Power of appointing new trustees.

10.—(1.) Where a trustee, either original or substituted, and whether appointed by a court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, then the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust, or if there is no such person or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee, may, by writing appoint another person or other persons to be a trustee or trustees in the place of the trustee dead, remaining out of the United Kingdom, desiring to be discharged, refusing, or being unfit or being incapable, as aforesaid.

(2.) On the appointment of a new trustee for the whole or any part of trust property :

(a) the number of trustees may be increased; and

(b) a separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property notwithstanding that no new trustees or trustee are or is to be appointed for other parts of the trust property and any existing trustee may be appointed or remain one of such separate set of trustees; or if only one trustee was originally appointed then one separate trustee may be so appointed for the first mentioned part; and

(c) it shall not be obligatory to appoint more than one trustee where only one trustee was originally appointed, or to fill up the original number of trustees where more than two trustees were originally appointed; but, except where only one trustee was originally appointed, a trustee shall not be discharged under this section from his trust unless there will be at least two trustees to perform the trust; and

(d) any assurance or thing requisite for vesting the trust property, or any part thereof, jointly in the persons who are the trustees shall be executed or done.

(3.) Every new trustee so appointed as well before as after all the trust property becomes by law, or by assurance, or otherwise, vested in

(z) See the Act set out in full in Appendix, Elph. Introd.

him, shall have the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust. 56 & 57 Vict. c. 53.

(4.) The provisions of this section relative to a trustee who is dead include the case of a person nominated trustee in a will but dying before the testator, and those relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this section.

(5.) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust and shall have effect subject to the terms of that instrument and to any provisions therein contained.

(6.) This section applies to trusts created either before or after the commencement of this Act.

Retirement of trustee.

11.—(1.) Where there are more than two trustees, if one of them by deed declares that he is desirous of being discharged from the trust, and if his co-trustees and such other person, if any, as is empowered to appoint trustees, by deed consent to the discharge of the trustee, and to the vesting in the co-trustee alone of the trust property, then the trustee desirous of being discharged shall be deemed to have retired from the trust, and shall, by the deed, be discharged therefrom under this Act, without any new trustee being appointed in his place.

(2.) Any assurance or thing requisite for vesting the trust property in the continuing trustees alone shall be executed or done.

(3.) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust and shall have effect subject to the terms of that instrument and to any provisions therein contained.

(4.) This section applies to trusts created either before or after the commencement of this Act.

Vesting of trust property in new or continuing trustees.

12.—(1.) Where a deed by which a new trustee is appointed to perform any trust contains a declaration by the appointor to the effect that any estate or interest in any land subject to the trust, or in any chattel so subject, or the right to recover and receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the deed become and are the trustees for performing the trust, that declaration shall, without any conveyance or assignment, operate to vest in those persons, as joint tenants, and for the purposes of the trust, that estate, interest, or right.

(2.) Where a deed by which a retiring trustee is discharged under this Act contains such a declaration as is in this section mentioned by the retiring and continuing trustees and by the other person, if any, empowered to appoint trustees, that declaration shall, without any conveyance or assignment, operate to vest in the continuing trustees

56 & 57 Vict. c. 53.

alone, as joint tenants, and for the purposes of the trust, the estate, interest, or right, to which the declaration relates.

(3.) This section does not extend to any legal estate or interest in copyhold or customary land, or to land conveyed by way of mortgage for securing money subject to the trust, or to any such share, stock, annuity, or property as is only transferable in books kept by a company or other body, or in manner directed by or under Act of Parliament.

(4.) For purposes of registration of the deed in any registry the person or persons making the declaration shall be deemed the conveying party or parties, and the conveyance shall be deemed to be made by him or them under a power conferred by this Act.

(5.) This section applies only to deeds executed after the thirty-first of December one thousand eight hundred and eighty-one.

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